Letter from Hon. THEOPHILUS PARSONS, L. L. D.

The eminent Law Writer and Professor of Law, in Harvard University.

CAMBRIDGE, *November* 9, 1857.

Dear Sir:—I have looked over the Book on Pleading you were good enough to send me, with great interest, from the beginning to the end.

Upon the general subject, I could not say what I think, without writing an essay: but it may all be summed up in the principles you express so accurately and concisely on page 49. To be even more brief than you, I would say:

1st. Common law pleading was a natural, rational and logical system of statement and counter statement, for the purpose of exhibiting precisely the actual issue, and eliminating every thing else.

2d. Its rules and forms, as they originally stood, were admirably devised for this purpose.

3d. Courts of law cannot do their proper work in a proper way, excepting by means of rules and forms, the same with those in essence and purpose, although they may be greatly simplified and improved in manner and phrase.

In my judgment, there never was a time when the diligent study of the *principles* of special pleading would have been more profitable than it would be now.

Your work seems to me careful and exact; it indicates learning and consideration, and is thoroughly systematic, and covers the whole ground of pleading in personal actions. I hope it will be studied beyond the precincts of your own state.

Very respectfully, &c.

THEOPHILUS PARSONS.

To SAMUEL TYLER, Esq.

Letter from the late WILLIAM CURTIS NOYES,

An eminent Lawyer of the New York Bar.

No. 265 FIFTH AVENUE, *April* 29, 1861.

My Dear Sir:

I thank you for sending me Mr. Tyler's excellent book on Pleading in Maryland. Please present to Mr. Tyler also my sense of personal obligation to him. I have been always of the opinion, that most of the common law rules of pleading could be advantageously retained, and I am glad to see, that, in one of our yet *sister* States, this has been done. The opposite course has tended to introduce ignorance and charlatanry, and to lessen the learning of the Bar. May the Bar of the Union, yet unite to restore the law, as well as the constitution, to its original integrity.

Yours, truly, WM. CURTIS NOYES.

To DANIEL BOWLEY, Esq.

A

TREATISE

ON

THE MARYLAND,

SIMPLIFIED,

PRELIMINARY PROCEDURE

AND

PLEADING,

In Courts of Law,

BY SAMUEL TYLER,

OF THE MARYLAND BAR.

"I entertain a decided opinion that the established principles of pleading, which compose what is called its science, are rational, concise, luminous, and admirably adapted to the investigation of truth, and ought consequently to be very carefully touched by the hand of innovation."

CHIEF JUSTICE KENT, 1 Johns. Reps. 471.

PHILADELPHIA:

T. & J. W. JOHNSON & CO.,

LAW BOOKSELLERS AND PUBLISHERS,

No. 535 CHESTNUT STREET.

1857.

Entered. according to Act of Congress, in the year 1857,

BY SAMUEL TYLER,

In the Clerk's Office of the District Court of Maryland.

KING & BAIRD, PRINTERS, 607 SANSOM ST.

DEDICATION.

TO THE MARYLAND BAR,

THIS book is dedicated, by one, who feels a State as well as a professional pride, that from colonial times to the present day, Maryland has been, and is, pre-eminently distinguished for able lawyers. It is hoped that, while the new system of pleading, which the book unfolds, will be an easier and surer means of administering the law, than the old was, it will be also found a better discipline for evolving, invigorating and sharpening the intellectual faculties of the student, as it conforms legal logic more nearly to common logic. With this hope, it is anticipated, that the Bar will continue to be the leading class of Maryland citizens, alike distinguished for legal learning, professional honor, and a bland courtesy which seeks the respect and the favor of the people.

SAMUEL TYLER.

Frederick, Md., July, 1857.

NOTE TO THE BAR.

In the performance of the duty, laid upon my colleagues and myself by the General Assembly of Maryland, of simplifying the Practice and Pleadings in the Courts of the State, it was assigned to me, with other work, to simplify the Pleading in the Courts of Law. As, therefore, I am the author of the system of Simplified Pleading, some of my professional brethren, in different parts of the State, have persuaded me to write this treatise for the benefit of the student, and perhaps the assistance of the practitioner, of the law. As therefore the treatise has not been obtruded upon the profession, but yielded at the solicitation of some of its ablest members, it deserves to receive the greater indulgence for its many imperfections. And while many of its defects are, doubtless, ascribable to my incompetency, I beg, that some be attributed to the short time I have had to prepare the work: not having had as many weeks, as I ought to have had months, for the labor. But the necessity for its immediate use would not allow me more time for its preparation.

It will be observed, that I have rarely referred to authorities, in my exposition of the doctrines of Pleading. This, it seemed to me, was best, for a book which is designed, to present the system of Pleading in its new aspect, embarrassed, as little as possible, by the old ideas which a look into authorities will necessarily recall into the mind. If any statement of doctrine be deemed erroneous, the enlightened practitioner will know where to find the authorities to correct my error.

CONTENTS.

CHAPTER FIRST.

CHAPTER SECOND.

CHAPTER THIRD.

INTRODUCTION.

From the earliest ages of English history, as the year-books and the oldest law treatises show, the lawyers and judges of England gave especial attention to law procedure, and considered skill in special pleading as the highest professional attainment; and yet so difficult was it to mould and develope the system of pleading so as to fit it for the exigencies of administrative justice, that pleading did not assume anything of the form of system, until the reign of Edward the First; and was, even then, only to be found in the scattered precedents of adjudged cases. In the reign of Charles the Second, a collection of adjudged points in pleading, classed, without skill, in alphabetical order, was published under the title of *Doctrina Placitandi.* This extensive collection became the store-house from which pleaders procured precedents. Between the years 1772–77, chief Baron Comyns, in his *Digest of the Laws of England*, under the title, *Pleader,* gave, to the use of the Courts, a more systematic compilation of authorities upon the subject. This able digest of authorities on pleading, was a great advance beyond any previous work. Next, the critical genius of Mr. Sergeant Williams, in his masterly notes to his edition of Saunders' Reports, elucidated the principles of pleading, and furnished an initial towards a scientific treatise upon the subject. Mr. Chitty, availing himself of the clear light of Mr. Sergeant Williams' notes, was, thereby, greatly assisted in constructing his elaborate and discriminating work, presenting the doctrines of pleading in a systematic form, which was published in the year 1808. Next appeared the treatise of Mr. Stephen, which, starting from a higher scientific

view of pleading, than that of Mr. Chitty, aimed at simplifying the system, while it lighted up its technical intricacies. The process of simplification had been begun centuries before, both by rules of the Courts, and by Acts of Parliament. Mr. Stephen only pointed more clearly to the import and scope of this effort on the part of Courts, but especially of Parliament, to free pleading from technical refinements, while, by his more accurate analysis of the principles of the system, he showed more clearly, wherein lay its substantial merits. His book was a vindication of the excellence of the system, before the contentious criticism of a restless and searching public opinion. He brought out the system from its theoretical entanglements; and showed what it is in substance, and what it is in form; thereby conducting to a simpler and more enlightened practice.

In considering the system of pleading, we must distinguish between the rules which are essential, permanent, and substantial, constituting the foundation of the well-weighed policy of special pleading, which has stood the test of ages, as the most efficacious instrument for enabling the jury to discharge their peculiar functions; and other rules of a more arbitary, technical, and artificial kind, which are founded on no great principle of judicial policy; but have been invented only as auxiliary in framing and preserving the other more substantial rules. This latter class of rules, which are only intended as auxiliary and corrective, have, frequently, in practice, been grievously abused by being applied to unessential defects in the form of pleadings, thereby determining causes, not upon the merit of rights, but upon the technical accuracy of the manner of stating them. The system of special pleading could never have been built up, without these technical rules requiring the strictest accuracy of statement. Because, there is no medium between accuracy and inaccuracy; and consequently, as long as the system was being formed and adapted to the manifold and multiform combinations of facts, which constitute causes of action and defences, no laxity of statement could be allowed without

danger of falling into the greatest looseness and prolixity. But after the system is formed, and what is substantial, and what incidental and formal only, can be clearly discriminated, it is advantageous to strip off the technicality which has now become only an encumbrance to its practical efficiency. This has been doing for centuries; while the system itself, as an offshoot of the trial by jury, and indispensable to its efficiency, has been preserved by the sternest will of the judicial and legislative powers of the British government.

There are two modes by which the abusive application of these more technical rules have been practised in the trial of causes: 1. By demurrer: 2. By motion in arrest of judgment. The remedies for the evil, have therefore been, from time to time directed, in so limiting the scope of the demurrer, as to diminish its abuse; and of lessening the defects that could be reached by motion in arrest of judgment. Blackstone in speaking of the earlier and the later practice, says: "After verdict and judgment upon the merits, they were frequently reversed for slips of the pen or mis-spellings; and justice was perpetually intangled in a net of mere technical jargon. The legislature hath therefore been forced to interpose by no less than twelve statutes, to remedy these opprobrious niceties; and its endeavours have been of late, so well seconded by judges of a more liberal cast, that this unseemly degree of strictness is almost entirely eradicated." The statutes, alluded to by Blackstone, commence in the reign of Edward the Third, and come down to George the First. Some of these statutes make the verdict cure many defects which before could have been taken advantage of by motion in arrest of judgment; and others of the statutes so limit the scope of the demurrer, that unless the defects be specifically stated in the demurrer, they could not be made available. These statutes greatly relieved the system from its technical entanglements. And if we compare the system of pleading, as set forth in the work of Mr. Stephen, with what it was just before each of these statutes was passed, we will find that as the system was developed by the Courts

and the bar, it was, from time to time, simplified by these statutes, until it had, by the rules and the practice of Courts in accordance with the requirements of these statutes, attained to the completeness and excellence pointed out by Mr. Stephen.

But never was it even thought of by the judicial or legislative mind, to abolish the system itself of special pleading. In the reign of Elizabeth, the national opinion of special pleading is well expressed, by Sir Thomas Smith, in his *Commonwealth of England.* "Having seen, (says he,) both in France and in other places, many devices, edicts and ordinances how to abridge process, and to find how that long suits in law might be made shorter, I have not perceived nor read, as yet, so wise, so just, and so well devised a mean found out as this, by any man among us in Europe. Truth it is, that when this fashion hath not been used, and those to whom it is new, it will not be so easily understood, and therefore they may, peradventure, be of contrary judgment; but the more they do weigh and consider it, the more reasonable they shall find it." This high estimate of special pleading has always been, and continues to be, entertained by the English nation, as represented in their Courts, and in their Parliament, and by their best writers upon judicial polity.

These opinions and sentiments of the English nation were brought to Maryland with the institutions to which they pertain. The Maryland legislature, as early as the year, 1763, passed an act directing the Courts of law to give judgment according to the merits of causes, without any regard to such defects in the pleadings as had been matters of special demurrer. This was a step in the simplification of pleading, beyond what had been done in England; yet it was only a step in the same direction, being merely the abolition of those technicalities, which, by the statutes of Elizabeth and of Anne, were to be disregarded by the Courts, unless objected to by special demurrer. The phraseology of the act is borrowed from these British statutes,

omitting the clause which leaves the defects still obnoxious to special demurrer.

In the year 1785, the legislature passed another act, allowing "amendments to be made in all proceedings whatever before verdict, so as to bring the merits of the question between the parties fairly to trial." In the year 1809, another act was passed, making the verdict cure all formal defects in both writs and pleadings.

The reform convention, in the year 1851, introduced into the constitution, which they framed for Maryland, a clause requiring the legislature, at their first session thereafter, to appoint commissioners to simplify the Pleadings and Practice in the Courts of the State. In accordance with this provision, the legislature, at the session of 1852, appointed the commissioners; and also passed an act going so far as to authorise the original writ or summons to "be amended from one form of action to another, when the ends of justice require it." This act, and all those which preceded it, are a progress in the same direction of the British statutes mentioned above, and with them show towards what end, law reform was, and had been long, striving. It was endeavoring to rid law procedure of the technical niceties which spring out of forms of action. For in truth, it is, out of forms of action, that most of those formal niceties spring, the omission of which in pleadings was ground for general demurrer in the earlier practice, and afterwards, under the statutes of Elizabeth and of Anne, of special demurrer. Now, the simplification, which it is the purpose of the following treatise to expound, is only a further step in this great reform, which has been progressing slowly, in a true conservative spirit, for centuries. Forms of action are abolished; and thereby, law procedure, and especially pleading, is released from the fetters which all the British statutes, and the Maryland acts of amendment, have, from time to time, been relaxing and loosening. Instead of having the difficulties, if not impossibilities, of changing one

form of action to another as allowed by the act of 1852, all that is now necessary to enable a plaintiff to make his pleadings conform to the justice of his case, is to amend his declaration by simply adding to it one or more counts, as will be seen in the treatise following.

There is, therefore, no new or radical reform ushered in. The simplification is only what the experience of centuries has, as it were, commanded to be done. It is but one more step up the path of judicial reform. A reform exactly parallel has been effected in England, abolishing forms of action, and simplifying pleadings. Maryland is, therefore, trying no mere experiment; but is acting upon the experience of centuries accommodated to the exigencies of the present times.

Parties to an Action.

When application is made to a lawyer, for his professional advice, the question arises, whether the right claimed or redress sought, if any, be in one person or more than one. If it be in one, the action, if brought, must be in the name of that person alone; but, if it be in more than one, the action must be in the names of all. So, on the other hand, if the obligation or liability be upon one person only, the action must be brought against that person alone; but if it be upon more than one person, the action must be brought against all the persons bound or liable; and if the obligation or liability be both joint and several, it may be sued either way. Hence springs up the doctrine of the joinder of parties, Plaintiffs, and Defendants, as the persons suing and sued are respectively called. But the doctrine of parties to an action does not, in strictness, belong to Pleading; and therefore, does not fall within the scope of this treatise. I refer the reader to the first chapter of the first volume of Chitty on Pleading, where the law of parties to an action is treated with great discrimination, great fulness, and a learned reference to authorities.

PROCEDURE AND PLEADING.

CHAPTER I.

PROCEDURE PRELIMINARY TO PLEADING.

PLEADING is so intimately connected with the preliminary procedure, which takes place in actions at law before the pleadings begin, that, in simplifying the pleadings it was thought advisable, on account of its practical advantages, to consider the two subjects together, and commence with the original writ, and simplify the whole course of procedure down to the judgment inclusive; so that every step, in an action at law, might be seen, in the order in which it occurs in practice, with each rule and each form standing in its proper place of succession. The *Act, therefore, simplifying Pleading, embraces the preliminary procedure also; and I shall in this treatise pursue the order of the Act, and consider the preliminary procedure before I treat of Pleading. And as the Act is divided into three chapters: the first embracing the preliminary procedure; the second embracing the rules of pleading; and the third embracing the forms of pleading, I have divided this treatise accordingly, and treated the respective subjects in three chapters in the order of the Act.

It is impossible to understand the simplified preliminary procedure, which I now propose to expound, without adverting to this procedure as it stood before the simplification.

There were, under the old system, what were called Forms of Action. Actions at law arise either out of some contract or out of some wrong; causes of action, therefore, are classed

* Act Assem. 1856, Ch. 112.

under two heads, those of contract and those of wrong. Each of these classes embraces many different causes of action. Out of this grew, what were called Forms of Action. Each cause of action was expressed in peculiar set words. These words constituted the *Form* of action, while the thing signified by them constituted the *Cause* of action. But these set words, which constituted the *Form* of action, did not give any definite insight into the *Cause* of action. The thing signified by the set words was so vague as to give no available information as to what an action was brought for. A writ, for example, notified the Defendant, "*to answer in a plea of trespass on the case.*" All the information, as to the cause of action, was given in those words. And even to the lawyer, they meant almost any thing. They might mean injuries which consist of a non-feasance or omission; or of actual or implied negligence; or injuries committed by fraud or deceit; or injuries to property of the Plaintiff's in the Defendant's possession; or injuries to reversionary interests; or injuries to reputation and other incorporeal rights; or injuries affecting the domestic relations; or injuries effected without direct interference with the Plaintiff's person or property; or all injuries for which there was no other remedy. The words "*plea of trespass on the case,*" might mean any of these various causes of action. And, to show how idle were many of the distinctions on which a difference in the Form of Action was based, I will refer to that between the action on the case of which I have just spoken, and the Action of Trespass. The criterion of distinction was, that the one was for an injury produced by immediate force, and the other for an injury produced by remote consequences of an act. If the Defendant threw a log in the street and it fell upon the Plaintiff and broke his arm, *trespass* was the remedy; but if the Plaintiff fell over the log and broke his arm, the remedy was *case.* The *formal* difference between these two actions, consisted in the insertion or omission of the words, "*with force and arms.*" If the Plaintiff had his arm broken in the way first mentioned, he

must use these words in the writ, or he would fail in his action; and if he had it broken in the way last mentioned, he must leave out these words, or he would fail in his action. Upon such distinctions were founded the Forms of Action; and there was a distinct writ for each Form of Action. The practitioner, therefore, had to determine for his client what was the Form of Action suited to his case. This frequently was a matter of difficulty, even when the precise state of facts could be ascertained: but when a different state of facts, from that to which the Form of Action had been adapted, was proved at the trial, the Plaintiff must lose his case, though the state of facts proved constituted a good cause of action. And every step, in the whole course of law procedure, including the pleadings and even the judgment, was more or less embarrassed by the Forms of Action.

The practice of using *forms* of action in Maryland was always absurd. In England the practice was sensible enough. There, an original writ, showing the real *cause* of action, issued out of Chancery, in the first instance, and informed the Defendant for what he was sued. A writ, corresponding to our *Capias* or *Summons,* containing the mere *form* of the action in the original writ, then issued out of the Court to which the original writ had been returned, to bring the Defendant into Court. These original writs can be seen in the first part of Stephen on Pleading. They set forth the cause of action almost as fully as the declaration. In Maryland the original writs were never used: but the *Capias* or *Summons*, which does not set forth the *cause* of action, but only the *form,* issued in the first instance, leaving the party sued without any information as to the precise cause of action. I refer the student of law, to the second chapter of the first volume of Chitty on Pleading, for a subtle, perspicuous and learned treatment of the doctrine of *Forms* of action, which should be studied, though it is now of no practical use in Maryland, as we shall presently see.

Under the system of simplified pleading, Forms of Action are abolished: and there are now only three writs by which

actions are brought. These three writs are founded on differences in causes of action that exist in the nature of things. One writ, called a *Summons,* applies to all actions brought for the recovery of money, whether founded in contract, or in wrong; another writ, called *Replevin*, applies to actions brought for the specific recovery of personal property; and the other writ, called **Ejectment*, applies to all actions brought for the specific recovery of real property. The distinctions of *money*, *personal property*, and *real property*, exist in nature, and cannot be confounded in law procedure, without confusion in the administration of justice. But to split, the process to recover money, into a great diversity of Forms of action, such as Debt, Covenant, Detinue, Trespass, and Trespass on the case, with varieties under the last two, as was done under the old system of law procedure, was of no advantage, while it was founded in a subtle artificial theory hard to be learned, and still harder to be practiced.

Before the New Constitution, there were two modes by which Defendants were informed, that an action at law was brought against them: 1. The Summons; 2. The Capias.

The Summons commanded the Sheriff to notify the Defendant to appear in Court on a certain day to answer the action of the Plaintiff.

The Capias commanded the Sheriff to take the body of the Defendant, and have him before the Court, on a certain day, to answer the action of the Plaintiff.

By the New Constitution, imprisonment for debt was abolished; and thereby the writ of Capias was abrogated. The Summons then became the only mode allowed by the Constitution for bringing an action at law to bear upon a Defendant; and thus all the writs for instituting actions at

* This treatise does not embrace the procedure in Ejectment. A special report, with simplified procedure, has been made on Ejectment by Mr. Price, my colleague; and in it, a writ of Ejectment has been provided as the first step in the action. Under the old law, there was no writ; the declaration being the first step.

law had, before the simplification, assumed the form of the Summons, which merely notifies the defendant to appear in Court, and does not command his body to be taken. The Act of Simplification, therefore, merely renders it unnecessary to mention any form or cause of action in the writ of Summons; because the Summons was virtually established by the Constitution, as the only writ for the cases to which it is applied by the Act of Simplification. The first four sections of the Act are in these words:

1. "All personal actions, except Replevin, brought in any Court of Law in this State, shall be commenced by Writ of Summons; and the said writ shall be issued by the clerks of the said Courts respectively, directed to the sheriff or other proper officer.

2. "It shall not be necessary to mention any Form or Cause of Action in any writ of summons.

3. "Every Writ of Summons shall contain the name or names of the Plaintiff or Plaintiffs, and of the Defendant or Defendants; and shall state the day and the place when and where the Defendant or Defendants is or are to appear to answer the Action; and shall bear date on the day on which the same shall be issued; and shall be tested in the name of the Judge of the Court from which it shall issue; and shall be signed, and sealed with the seal of the Court, by the Clerk thereof.

4. "The Writ of Summons shall be in the following form:

"——— County (*or City*) to wit:

State of Maryland to the Sheriff (*or other proper officer*) of ——— greeting:

You are hereby commanded to summon (*here insert the name or names of the Defendant or Defendants*) of ———

County (*or City*) to appear before the (*here insert the name of the Court*) to be held at (*here insert the name of the place*) in and for (*here insert the name of the County or City*) on the —— day of —— next, to answer an Action at the suit of (*here insert the name of the Plaintiff or Plaintiffs.*)

And have you then and there, this writ. Witness, the Honorable ———, Judge of the said Court, the —— day of ——, in the year &c.

(Signed,)

———, Clerk."

It will be seen, that, by the third section of the Act, the writ must be tested of the day on which it is issued, and not, as under the old practice, of the first day of the term. Thus, there is but one date to the writ, serving both to show the day it issues, and of its attestation in the name of the judge of the Court.

Before the Action can be brought, the Plaintiff or his attorney must deliver to the Clerk of the Court, a Memorandum in writing, of the Action to be brought. The Memorandum corresponds with the *Titling*, as it was called under the old Maryland practice, and with the *Præcipe* under the English. It is an authority to the Clerk for docketing the Action and issuing the Summons. For, as every person, not under some personal disability,—as nonage or coverture, can bring an Action, it being *ex debito justitiæ*, and not *ex gratia*, the Clerk is bound by the duty of his office to issue the Summons. And while the Memorandum imposes a duty on the Clerk, it gives him an authority to issue the Summons which cannot be disputed. The Memorandum is prescribed and regulated by the fifth section of the Act of Simplification in these words:

5. "Before the issuing of any Writ of Summons, the Plaintiff, or Plaintiffs, or his, her, its or their Attorney, shall deliver a Memorandum in writing according to the following form, or to the like effect:

"A Plaintiff against C. B., } E. S. Clerk of the
or } ———
against C. B. and D. E } Issue in this case.
Brought the —— day of —— 18—
Signed ——— ——"

"Such Memorandum to be delivered to the Clerk of the Court, and to be dated on the day of the delivery thereof, and signed by the Plaintiff or Plaintiffs, or his, her, its or their Attorney."

Thus far, I have been showing, what is required of the Plaintiff, by the Statute of Simplification, in bringing a suit. I will now show what the Statute enacts in regard to the Defendant.

The Defendant does not become an actor, or party to the action, until he has been legally notified of it, by the service of the Summons upon him personally, by the Sheriff or other proper officer. It then becomes the duty of the Defendant to answer to the action, by appearing to it, according to the mode pointed out by the Statute of Simplification. But it may happen, that the Sheriff cannot serve the Summons on the Defendant. In such case, when the Sheriff reports to the Court, or, as it is called, *makes his return*, that the Defendant, "cannot be found," as he is obliged to do, on the return day of the Summons, the Action would be dead, and a new one would have to be brought, if the Summons could not be renewed in the Action already brought. Accordingly, the writ instituting an action has always been renewable, from Court to Court, until the Defendant is found. Under the simplified practice, the renewal of the Summons is regulated by the sixth section of the Act of simplification, which is in these words:

6. "If any Defendant or Defendants named in any writ of Summons shall not have been served therewith, by the return day of the Writ, such writ may be renewed, at any

time before the next term of the Court, and be returnable to the same, and may be so renewed and returnable again to succeeding terms, as long as may be necessary; and a writ of Summons so renewed shall remain in force and be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, and for all other purposes, from the date of the issuing the original writ of Summons."

The returns, which the Sheriff is to make to the Summons, and the mode of making them, are pointed out by the seventh section of the Act of Simplification in these words:

7. "The Sheriff or other person serving the writ of Summons, shall endorse on the same, 'summoned,' or 'cannot be found,' or 'is dead,' or as the case may be."

The mode of serving the Summons is pointed out by the eighth section of the Act of Simplification in these words:

8. "The service of the writ of Summons shall be as heretofore, personal."

It may happen, that though the Defendant has been summoned, he neglects to appear to the action. As imprisonment for debt is abolished, there is now no mode of compelling the defendant to appear. The whole subject of the appearance of the Defendant, whether there be only one defendant or more than one, and whether none appear, or only some appear, is regulated by the ninth, tenth and twelfth sections of the Act of Simplification. The sections are as follows:

9. "In any Action brought against two or more Defendants, if one or more of such Defendants, only, shall appear, and another or others of them shall not appear: provided

the writ of Summons has been served upon such as do not appear, it shall be lawful for the Plaintiff or Plaintiffs to declare against all of the Defendants, and proceed as if they all had appeared.

10. "A Defendant or Defendants may appear at any time before judgment; and if he, she, or they appear after the time specified in the writ of Summons, he, she or they shall, after notice of such appearance to the Plaintiff or Plaintiffs, or his, her or their Attorney, as the case may be, be in the same position as to Pleadings and other proceedings in the Action, as if he, she, or they had appeared in time: provided always, that a Defendant, appearing after the return day in the writ, shall not be entitled to any farther time for pleading or any other proceeding, than if he had appeared within the appointed time.

12. "In any case where the Defendant has been summoned, and does not appear by the return day of the writ, the Plaintiff may proceed as if he, she or it had appeared."

It is observable, that, by these sections, whether a Defendant appears or not, if he has been summoned, the Plaintiff can proceed in his action and obtain judgment against him just as though he had appeared.

If the Defendant does appear to the action, he must do it in the mode prescribed by the eleventh section of the Act of simplification. This section, which for the sake of the better logical order, I am considering out of its order in the Act, is in these words:

11. "The mode of Appearance to every writ of Summons, shall be by delivering a Memorandum in writing according to the following form, or to the like effect:

"A Plaintiff against C. B., or against C. B. and another, or against C. B. and others.	The Defendant C. B. appears in person, or S. T., Attorney for C. B., appears for him.
Signed	—— ——— "

Such Memorandum to be delivered to the Clerk of the Court, and to be dated on the day of the delivery thereof, and signed by the Defendant or Defendants, or his, her, its or their Attorney."

The Memorandum, required by this section, to be signed and delivered to the Clerk of the Court by the Defendant or his Attorney, like the one required from the Plaintiff when he brings his action, is intended as a protection to both the Defendant or his Attorney and the Clerk. Though of rare occurrence, it has nevertheless happened, that judgment has been found confessed on the docket of the Court, by an Attorney, when he has declared that he had no recollection of any such action, and that he never authorized the appearance entered on the docket, nor confessed the judgment; while the Defendant was wholly ignorant of any such action having been brought against him. It is to prevent any such occurrences as these and other difficulties, which sometimes occurred under the old practice, that this Memorandum is required to effect an appearance.

I have now passed, in review, the whole law regulating actions brought by summons, which embrace nine-tenths or more of all actions at law, under the Act of Simplification. Under the old practice, with all the abstruse and technical doctrine in regard to Forms of action, it would require months of labour, from the student, to master the amount of practice in conducting an action, which, under the simplified practice, he can acquire in a few days.

REPLEVIN.

The next subject which will occupy our attention, is the Action of Replevin. Many changes are effected in this action, by the Act of simplification. Replevin is an ancient writ, used from the earliest times in England, and was brought, with other legal process, by our ancestors, to Maryland. In England the scope of the writ was very narrow. "Replevin (says Chitty in the first volume of his Pleading) is now seldom brought but for distresses for rent, damage feasant, poor's rate, &c." In Maryland it has been enlarged and made the special remedy for trying the title to any personal property, by taking it out of the possession of the person holding it, and delivering it to the person claiming it; the person claiming it being required to give a bond, before the issuing of the writ, to prosecute his claim with effect, else to return the property to the person from whom it was taken. By the Act of Assembly, 1825, Chap. 65, Replevin is also made a remedy for the recovery of an apprentice. The Act of Simplification has not narrowed the scope of the writ: but it has simplified the form of the writ and also the practice under it; as well as extended the action of Replevin, by a new device, to cases coming under the action of Replevin, which, on account of difficulties when a defendant resides in one County or jurisdiction, and the goods sought to be replevied are in another, it did not seem to reach.

There are two commands in the writ of Replevin: one, to replevy and deliver the property claimed to the plaintiff; the other, to summon the defendant to appear in Court to answer to the action. If the Sheriff found the property, he reported or returned, as it is called, to the Court that he had replevied and delivered the property to the plaintiff. If he could not find the property, he reported or returned, to the Court, that the property was *eloigned*, that is, taken

away. When the property was returned *eloigned*, then, what was called, an *alias* writ of Replevin issued, and on the return of *eloigned* on this, a *pluries* writ of Replevin issued, and on a like return to this, what was called a *Capias in Withernam* issued. This practice is well discussed in Evans' Maryland Practice.

By the Act of Simplification the *Alias*, *Pluries*, and *Capias in Withernam* writs are abolished; and upon the return of *eloigned*, the Replevin is renewable like the Summons: or the plaintiff may, which he could not do under the old law, declare only for damages, and recover the value of the property instead of the property itself. These changes in the law will appear by the thirteenth and twentieth sections of the Act of Simplification, which are in these words:

13. "The Action of Replevin shall be brought for the specific recovery of personal property, and for damages for the detention of the same; and in case of the property being eloigned for damages only, and costs."

20. "In case of the return by the Sheriff of 'Eloigned' to any Writ of Replevin, the writ may be served in the same manner as the Writ of Summons; and no *alias* or *pluries* Writ of Replevin, or *Capias in Withernam* shall hereafter be used. And upon the renewal or renewals of such Writ of Replevin, the Bond upon which the first writ was issued shall be responsible."

The form of the Writ of Replevin as simplified, is prescribed by the fourteenth and fifteenth sections of the Act of Simplification, which are in these words:

14. "The Writ of Replevin shall specify the particular goods and chattels to be replevied, and shall contain the name or names of the Plaintiff or Plaintiffs, and of the Defendant or Defendants; and shall contain a summons for the Defendant or Defendants to appear before the Court, and

shall state the time and the place for such appearance; and shall bear date on the day on which it shall be issued; and shall be tested in the name of the Judge of the Court from which it shall issue; and shall be signed and sealed with the seal of the Court, by the Clerk thereof.

The Writ of Replevin shall be in the following form:

"——— County (*or City*) to wit:

State of Maryland to the Sheriff (*or other proper officer*) of ———, greeting:

You are hereby commanded to replevy and deliver to (*here insert the name or names of the Plaintiff or Plaintiffs*) the following goods and chattels (*here insert them*) which a certain (*here insert the name or names of the Defendant or Defendants*) of ——— County (*or City*) unjustly withholds from the said Plaintiff or Plaintiffs, and to summon the said (*Defendant or Defendants*) to appear before the (*here insert the name of the Court*) to be held at (*here insert the place*) in and for (*here insert the County or City*) on the ——— day of ——— next, to answer an action at the suit of (*here insert the name or names of the Plaintiff or Plaintiffs.*)

And have you then and there this Writ.

Witness the Honorable ———, Judge of the said Court, the ——— day of ———, in the year, &c.

Signed,

———, Clerk."

In order to bring an action of Replevin, it is not necessary to deliver to the Clerk a Memorandum, as is required before issuing a Writ of Summons; as a bond is required to be given, and this serves the purpose of the Memorandum. The sixteenth section of the Act of Simplification regulates the matter, and is in these words:

16. "It shall not be necessary for the Plaintiff or Plaintiffs in an Action of Replevin, to deliver to the Clerk of the Court

a Memorandum in writing, as is required to be done before the issuing of a Writ of Summons, but the Writ of Replevin shall be issued by the Clerk of the Court, upon a proper Bond being delivered to him, and the other pre-requisites of the law, if any, complied with."

The mode of appearance however is the same to a Writ of Replevin as to a Summons, as is seen by the seventeenth section of the Act of Simplification, which is as follows:

17. "The mode of appearance to a Writ of Replevin by the Defendant or Defendants, shall be by delivering a Memorandum in writing to the Clerk of the Court, like the one required for appearing to the Writ of Summons."

In case the Defendant when summoned, does not appear on or before the fourth day of the term of the Court, next succeeding that to which return is made; the Court, on motion by the Plaintiff, shall enter judgment for the property replevied, and for damages on proof of any, and costs. This is authorized by the eighteenth section of the Act of Simplification, in these words:

18. "In all actions of Replevin, if the Defendant or Defendants shall be returned 'Summoned,' and shall not appear in person or by Attorney, on or before the fourth day of the term, next succeeding that to which such return shall be made, the Court shall be authorized and required, on motion, to enter up judgment for the Plaintiff or Plaintiffs for the property replevied, and for damages in the discretion of the Court, upon satisfactory proof of any, and costs; which judgment shall be as valid and effectual, as any judgment rendered on the verdict of a jury."

The returns to the Writ of Replevin to be made by the Sheriff, are prescribed by the nineteenth section of the Act of Simplification, in these words:

19. "The Sheriff or other person serving the Writ of Replevin shall endorse on the same, 'Replevied and Delivered' or 'Eloigned,' as a return to that part of the writ which directs the Replevin; and on the part of the writ which directs the Defendant or Defendants to be summoned, the same returns as on the Writ of Summons."

This section is so plain in its import, that it does not need exposition.

Under the old practice, when one or more of the Defendants, in an action of Replevin, resided in a different County from that in which the goods and chattels to be replevied were situated, there was a difficulty, if not an impracticability, in enforcing the action. To remedy the omission, the Act of Simplification, by the twenty-first, twenty-second, twenty-third, twenty-fourth and twenty-fifth sections, has provided a mode of proceeding unknown to the old practice. The sections are as follows:

21. "If, in any action of Replevin, the Defendant or Defendants, or any one or more of them, shall reside in a different jurisdiction or jurisdictions in the State, from that in which the goods and chattels to be replevied are, there shall, at the time the Writ of Replevin is issued, or upon the return of the same, be a notice or notices in writing sent through the Post Office, by the Clerk of the Court from which the writ issues, to the Sheriff or Sheriffs of the County or Counties or City in which the Defendant or Defendants reside, to be served upon the Defendant or Defendants, notifying him, her, it or them that such writ has been issued; and it shall be returnable on the same day with the writ, when it is issued simultaneously with it, but returnable at the next term, when it is issued upon the return of the writ.

22. "The notice required by the preceding rule shall be as follows:

"——— County (*or City*) to wit:

State of Maryland, to the Sheriff (or other proper officer) of ——— greeting:

You are hereby commanded to notify (*here insert the name or names of the Defendant or Defendants to be notified*) that (*here insert the name or names of the Plaintiff or Plaintiffs*) has or have issued out a Writ of Replevin from (*here insert the name of the Court*) against certain goods and chattels in the County (*or City*) aforesaid, which the said (*here insert the name or names of the Plaintiff or Plaintiffs*) says the said [*here insert the name or names of the Defendant or Defendants to be notified, and also the name or names of those, if any, who reside in the County or City where the goods and chattels are,*) withhold or withholds from him, her or them; and that he, she or they appear before the said Court to be held at (*here insert the place*) on the —— day of —— next to answer said suit.

And return you then and there, this notice.

Witness the Honorable ——— Judge of the said Court, the —— day of ——— in year, &c.

(Signed)

—— ——— Clerk."

24. "Before the issuing of any Notice in an Action of Replevin, the Plaintiff or Plaintiffs, or his, her, its or their Attorney shall deliver a Memorandum in writing, according to the following form or to the like effect:

"In the Action of Replevin brought by (*here insert the name or names of the Plaintiff or Plaintiffs*) against (*here insert the name or names of the Defendant or Defendants*) A. B. (*or A. B. and C. D. &c.*) Defendant (*or Defendants*) resides in (*here insert the County or City.*)

Give him, her, it or them, notice of the Action.

Delivered the —— day of ——— 18—

(Signed,)

—— ———."

To E. T., Clerk, &c.

Such Memorandum to be delivered to the Clerk of the Court, and to be dated on the day of the delivery thereof, and signed by the Plaintiff or Plaintiffs, or his, her, its or their Attorney.

24. "And in case the Defendant or Defendants so residing in a different jurisdiction shall be returned 'Notified,' and shall not appear in person or by Attorney on or before the fourth day of the term next succeeding that to which such return shall be made, the Court shall be authorized and required, on motion to enter up judgment for the Plaintiff or Plaintiffs for the property replevied and for damages in the discretion of the Court, upon satisfactory proof of any, and costs; which judgment shall be as valid and effectual as any judgment rendered on the verdict of a Jury.

25. "And such Notice to a Defendant or Defendants, residing in a different jurisdiction, shall, upon a return of "cannot be found," be renewable, in the same manner as a writ of Summons, against any Defendant not served therewith."

We have now passed in review, the whole initiatory process, in personal actions. Under the old practice, it was an exceedingly complex and subtle title, requiring long study and large practical experience, to master its principles and its practical details. Under the simplified procedure, as I have expounded it, all those perplexing questions about the form of action, or the proper writ to be issued, in a given case, are entirely excluded from practice. And as there are only two writs in personal actions, under the simplified procedure, the only question which can arise, is as to the choice between these two,—Summons and Replevin. About this, there can, of course, never be a mistake; as Replevin is confined to the specific recovery of personal property, and by the Act of Assembly 1825, Ch. 65, for the recovery of an apprentice. In all other cases, except for the specific

recovery of land, the proper writ is the Summons. The student, when he enters upon the study of law procedure, is supposed, to be familiar with the doctrine of causes of action, or, in other words, to have a correct knowledge of *legal* rights and wrongs remediable at law. Law procedure merely teaches, the modes of enforcing rights and redressing wrongs.

JOINDER OF PARTIES TO AN ACTION.

In a previous part of this treatise, I called attention to the subject of Parties to an Action, and said that the law of the subject did not pertain to Pleading, and consequently, did not come within the scope of this treatise. Though this be so, yet it pertains to procedure preliminary to Pleading, to regulate the practice in regard to the non-joinder and the mis-joinder of parties both Plaintiff and Defendant. For it may happen, that persons have not been joined as Plaintiffs in an action who ought to have been joined, or that persons have been joined as Plaintiffs who should not have been joined; and the same non-joinder or mis-joinder may happen in regard to defendants. This error will have been committed, if at all, upon the return of the Summons, as it must originate in the Memorandum of the Plaintiff filed at the bringing of the Action, and should be rectified as soon as known to the Defendant, so as to produce as little embarrassment and delay in the action as possible. The subject therefore comes properly within procedure preliminary to Pleading, and is embraced in the Act of Simplification.

JOINDER OF PLAINTIFFS.

The practice in regard to the errors of non-joinder and the mis-joinder of Plaintiffs is regulated by the twenty-sixth,

twenty-seventh, and twenty-eighth sections of the Act of Simplification. The sections are as follows:

26. "It shall and may be lawful for the Court, at any time before the trial of a cause, to order that any person or persons, not joined as Plaintiff or Plaintiffs in such cause, shall be so joined, or that any person or persons, originally joined as Plaintiff or Plaintiffs shall be struck out from such cause, if it shall appear to the Court that injustice will not be done by such amendment, and that the person or persons to be added as aforesaid, consent, either in person or by writing under his, her or their hands, to be so joined, or that the person or persons to be struck out as aforesaid, were originally introduced without his, her or their consent, or that such person or persons consent in manner aforesaid to be struck out; and such amendment shall be made upon such terms as to the amendment of the pleadings, (if any,) postponement of trial, and otherwise, as the Court shall think proper; and when any such amendment shall have been made, the liability of any person or persons who shall have been added as Co-plaintiff, or Co-plaintiffs shall, subject to any terms imposed as aforesaid, be the same as if such person or persons had been originally joined in the cause.

27. "In case it shall appear at the trial of any action, that there has been a misjoinder of Plaintiffs, or that some person or persons not joined as Plaintiff or Plaintiffs ought to have been so joined, such misjoinder or non-joinder may be amended as a variance at the trial, if it shall appear to the Court that injustice will not be done by such amendment, and that the person or persons to be added as aforesaid consent either in person or by writing, under his, her or their hands, to be so joined, or that the person or persons, to be struck out as aforesaid, were originally introduced without his, her or their consent, or that such person or persons consent in manner aforesaid to be so struck out, and such amendment shall be made upon such terms as the

Court shall think proper; and when any such amendment shall have been made, the liability of any such person or persons, who shall have been added as Co-plaintiff or Co-plaintiffs, shall, subject to any terms imposed as aforesaid, be the same as if such person or persons had been originally joined in such action.

28. "In all cases where a plea in abatement of non-joinder of a person or persons as Co-plaintiff or Co-plaintiffs shall be pleaded, the Plaintiff shall be at liberty, without any order of the Court, to amend the writ and other proceedings before plea, by adding the name or names of the person or persons named in such plea, and proceed in the action without any further appearance, on payment of the costs of, and occasioned by such amendment only, and in such case, the Defendant shall be at liberty to plead *de novo*."

By the twenty-ninth section of the Act of Simplification, a husband is authorised to join, in an action where his wife is necessarily joined with him, claims in his own right. This provision is designed to prevent a multiplicity of actions and unnecessary expenses. As for example: If a husband and wife are both injured at the same time, and by the same accident on a Rail-road, two actions would, under the old law, have to be brought. And the proceedings would have been very much like trying one case twice; as the accident would be the same, and the witnesses, for the most part, the same. It is however optional with the husband to bring one or more actions. The section of the Act in regard to the matter is in these words:

29. "In any action brought by a man and his wife, in respect of which she is necessarily joined as Co-plaintiff, it shall be lawful for the husband to add thereto claims in his own right; and separate actions brought in respect of such claims may be consolidated, if the Court shall think fit;

provided, that in the case of the death of either Plaintiff, such suit, so far only as relates to the causes of action, if any, which do not survive, shall abate."

JOINDER OF DEFENDANTS.

The Act of Simplification has applied the same principles of practice to the non-joinder and the mis-joinder of Defendants which it has applied to Plaintiffs. The old law has been changed: but the student can derive no practical benefit from a rehearsal of it; as it is abrogated, and is not so connected with the new law as to shed light on it, as is the case in some other parts of the work of Simplification. The non-joinder and the mis-joinder of Defendants is regulated by the thirtieth, thirty-first, and thirty-second sections of the Act of Simplification. The sections are as follows:

30. "It shall and may be lawful for the Court in the case of the joinder of too many Defendants in any action on contract, at any time before the trial of such cause, to order the name or names of one or more of such Defendants to be struck out, if it shall appear to such Court that injustice will not be done by such amendment; and the amendment shall be made upon such terms as the Court by whom such amendment is made shall think proper; and in case it shall appear at the trial of any action on contract, that there has been a misjoinder of Defendants, such misjoinder may be amended, as a variance at the trial, in like manner as the misjoinder of Plaintiffs has been before directed to be amended, and upon such terms as the Court shall think proper.

31. "In any action on contract where the non-joinder of any person or persons as a Co-defendant or Co-defendants has been pleaded in abatement, the Plaintiff shall be at liberty, without any order, to amend the Writ of Summons

and the Declaration by adding the name or names of the person or persons named in such plea of abatement as joint contractors, and to serve the amended writ upon the person or persons so named in such plea in abatement, and to proceed against the original Defendant or Defendants, and the person or persons in such plea in abatement: provided that the date of such amendment shall, as between the person or persons so named in such plea in abatement and the Plaintiff, be considered for all purposes as the commencement of the action.

32. "In all cases after such plea in abatement and amendment, if it shall appear upon the trial of the action that the person or persons, so named in such plea in abatement, was or were jointly liable with the original Defendant or Defendants, and resided in the County or City where the action is brought, the original Defendant or Defendants shall be entitled as against the Plaintiffs to the costs of such plea in abatement and amendment; but if at such trial it shall appear that the original Defendant or any of the original Defendants is or are liable, but that one or more of the persons named in such plea in abatement is or are not liable as a contracting party or parties or does or do not reside in the County or City where the action is brought, the Plaintiff shall nevertheless be entitled to judgment against the other Defendant or Defendants who shall appear to be liable; and every Defendant who is not so liable shall have judgment, and shall be entitled to his costs as against the Plaintiff, who shall be allowed the same, together with the costs of the plea in abatement and amendment, as costs in the case against the original Defendant or Defendants who shall have so pleaded in abatement the non-joinder of such person: provided, that any such Defendant who shall have so pleaded in abatement shall be at liberty on the trial to adduce evidence of the liability of the Defendants named by him in such plea in abatement, and

of their residence in the County or City where the action is brought."

In the foregoing sections, the Plea in Abatement is frequently mentioned; the law of which, the Student is supposed not, as yet, to understand. It will be treated of hereafter in its proper place. Until then, the Student will suspend his attention in regard to it.

JOINDER OF CAUSES OF ACTION.

This is an important part of law procedure. When a person has several different causes of action, and is about to enforce them, it is important to know, whether he can embrace them all in one action, or must bring more than one. Under the old system of procedure this was an exceedingly difficult matter to know. Forms of action, of which I have heretofore spoken, created artificial distinctions which prevented causes of action from being joined, which in themselves might be conveniently tried together. We have seen, that if a log of wood be thrown upon a man and breaks his arm, he must under the old law bring an action of trespass; but if he falls over the log after it has fallen, and breaks his arm, he must bring an action on the case; the difference in the forms of action consisting in the insertion or omission of the words *vi et armis*. Now if it so happened that a person had received injuries both ways, from the same person, he could not have joined the two causes of action in one suit; because trespass and case could not be joined. (1st Chit. Plead. 182. Saund. Rep. 117, note h.) Forms of action created difficulties in two ways; first, in the application of the wrong form of action to a particular case; and secondly, in the mis-joinder of forms of action. If a wrong form was applied, it was fatal to the action; and if causes of action were joined which the forms of action forbid, it was fatal too.

The supposal of forms of action was, that they were founded upon substantial distinctions which prevented incongruous and dissimilar causes of action from being inconveniently mixed together in the same suit. But this is not so. For causes the most dissimilar in their intrinsic nature might be joined under the doctrine of forms of action, while those almost identically alike could not be joined. "The Plaintiff might join in one action a claim on a promissory note, on a breach of promise of marriage, and a complaint of negligence against an attorney; in a second, he might join a claim for criminal conversation with trespass to his person, his lands or his goods; in a third, he might sue for the seduction of his daughter, infringing his patent, and for negligently driving over, and for slandering him; because in all these cases the form of action was the same." The joinder therefore of the most incongruous causes of action might occur under the old procedure with its forms of actions supposed to guard against it. The Act of Simplification, has, as we have seen, abolished forms of action, and permits a Plaintiff to join any causes of action, except Replevin and Ejectment, in the same suit. The whole matter of such joinder is left to the sound sense and the self-interest of the Plaintiff. As Plaintiffs did not embarrass themselves under the old system, by joining together in one action, the incongruous causes which could be joined under it, it is concluded that they will not join such under the new, which permits them to join or not to join the causes of action in one suit. And as before the Consolidating Act, 1825, Ch. 167, which compels Plaintiffs to join certain causes of action, which convenience and economy require to be joined, Plaintiffs never did join them, though there was no technical difficulty in the way, it will be contrary to experience to suppose, that Plaintiffs will now join incongruous causes of action to the embarrassment of trials. Whereas, by permitting Plaintiffs to exercise their discretion in the matter, causes of action, which it is proper should be joined, but which technical

difficulties, created by the forms of action, prevented heretofore from being joined, may be joined to the advancement of a just administration of the law, and to the avoidance of the delay and expense which sometimes occurred under the old procedure from a mis-joinder of causes of action congruous in themselves, but technically inconsistent.

Because of such considerations, the Act of Simplication leaves it optional with the Plaintiff to join any causes of action in the same suit, except those for which Replevin and Ejectment are brought. These actions, as I have heretofore explained, are provided for the specific recovery of property; the first for personal property; the second for real property. They act on the specific thing claimed; and therefore require specific judgments. These exceptions, too, make a natural division of causes of action into those for the recovery of satisfaction in money, whether due on contract or for wrong; and those for the specific recovery of each of the two kinds of property, which are recognized as distinct under all systems of laws, *personal* and *real*. A simple practice is thus founded, on obvious and natural distinctions, between the classes of things claimed in actions at law.

But if it should happen, that a Plaintiff does join causes of action, which it is embarrassing to try in one suit, the Court has power under the simplified procedure to order them to be tried separately. The practice of the whole subject of joinder of causes of action is regulated by the thirty-third section of the Act of Simplification, in these words:

33. "Causes of Action of whatever kind, provided they be by and against the same parties, and in the same rights, may be joined in the same suit; but this shall not extend to Replevin or Ejectment; but the Court shall have power to prevent the trial of different causes of action together, if, in the opinion of the Court, such trial would be inexpedient; and in such case, the Court may, when the case

comes on for trial, or before, direct separate cases to be docketed, and separate trials to be had in their order of priority, either immediately or at such time or times as the Court shall deem most equitable and just."

The Act of 1825, ch. 167, affects the subject matter of the joinder of causes of action, as I have already intimated. By the first section, "it shall not be lawful to institute more than one suit on a joint and several bond, penal or single bill, where the persons executing the same are alive, and reside in the same county; and if more than one suit be instituted on any such bond, penal or single bill, judgment of non pros shall be entered against the plaintiff," &c.

And by the fifth section, "in all cases where two or more actions of debt or obligations conditioned for the payment of money, or two or more actions on the case arising ex-contractu by and between the same Plaintiff or Plaintiffs, and the same Defendant or Defendants shall hereafter be brought at one and the same term, the Court in which said actions are pending, shall, upon motion of the Defendant or Defendants, order said actions to be consolidated; and when the said actions are consolidated, the Court shall order and direct the Clerk to tax the costs of but one action."

The Act of Simplification does not affect the foregoing sections of the Act of 1825, ch. 167. A Plaintiff must still bring but one suit in the cases specified in the first section. And a Defendant may still have separate actions consolidated in the cases mentioned in the fifth section. The practice of consolidating actions, to save costs, is an ancient one long used in England. Our Act of Assembly does but apply an old principle in the cases enumerated. It is a wholesome practice and should be continued.

CHAPTER II.

PLEADING.

THE Defendant having appeared to the Writ of Summons, the next step in the regular progress of an action, is the delivery, by the respective parties, in alternate order, to the Clerk of the Court, to be filed in the case, the statements in writing of their respective grounds of complaint and defence, which are called the Pleadings.

It is necessary, in order that the Student may understand the simplified Pleading, that he should have exhibited before him the Common Law system of Pleading, as it stood before it was simplified. And as nothing can be so well understood, when considered merely in itself, as when in contrast with its opposite, I will consider the Common Law Pleading in contrast with the Civil Law Pleading; as by the contrast, the peculiar character and merit of the Common Law Pleading can be better exhibited and expounded. For the Common Law of England and the Civil Law of Ancient Imperial Rome, as far as their administrative principles and forms of procedure are concerned, are the opposites of each other.

The purpose of judicial proceedings is to ascertain and to decide upon disputes between parties. In order to do this, it is indispensable that the point or points in controversy be evolved and distinctly presented for decision. The Common Law and the Civil Law have different modes for accomplishing this purpose. The rules of Common Law Pleading are designed to develop and present the precise point in dispute upon the face of the written pleadings or record, without requiring any action on the part of the Court for the purpose. The parties are required to plead alternately, until their allegations terminate in a single

material issue, as it is called, either of law or fact asserted on one side and denied on the other, the decision of which will dispose of the cause and settle the dispute.

By the Civil Law, the parties are not required to plead, in such a way, as to evolve upon the record by the allegations themselves, the point or points in dispute: but are permitted to set forth all the facts, which constitute the cause of action or the defence, at large; the questions of law not being separated from the questions of fact, as they are in the Common Law Pleadings: but the whole case is presented in gross to the Court for its determination. Under this system, the Court has the labor of reviewing the complex allegations of both parties, and methodising them and evolving the real points on which the controversy turns.

When the Court of Chancery in England begun to take judicial cognizance of disputes between parties, it adopted the Civil Law mode of procedure. This Court assumed to eschew the strict and technical Rules of the Common Law, and to proceed upon the broad equities of the cause; and therefore naturally required the statement of the facts, by both parties, at large. As the mode of trial by jury did not pertain to this Court, the inconvenience of mingling questions of law and fact was not felt; as they were both decided by the Court, and therefore needed not to be separated on the record, as in Courts of Law, where they are decided by different tribunals. And besides, the Chancellor could take time for the examination of the questions both of law and fact involved in the allegations. There is therefore nothing in the organization of the Court of Chancery which forbids the use of the Civil Law mode of pleading.

But this mode of Pleading is not applicable to Common Law Courts. In these Courts, questions of law are decided by the Court, while questions of fact are decided by the jury. It is therefore, at least, convenient that these questions, which are decided by different tribunals, should be separated on the record before the case is presented for trial.

The real points, about which the parties differ, cannot be so easily evolved from the complicated mass of facts, in the hurry of a trial, as they can be, by Pleadings carefully framed before-hand, by learned lawyers, in accordance with Rules and Forms which require all issues to be certain and single, and to be framed on the record itself by an affirmative and a negative statement of the parties. And it is sufficiently manifest, that it will facilitate the due administration of justice, to have the record of every case disencumbered of all extraneous matter, and of every thing irrelevant and immaterial, and nothing but the naked point in dispute, whether of law or of fact presented distinctly to the Court and the jury; as is done by special or Common Law Pleading. And when the decision is made, no matter how loosely the opinion of the Court may be expressed, or how many irrelevant dicta it may enounce, the pleadings in the case give definiteness to the point or points decided, and excluding all others, preserve them forever as a precedent for the guidance of future judges.

As, in actions at law, questions of fact as well as questions of law are necessarily involved; and as questions of fact are, for the most part, determined by the oral testimony of witnesses deposing in open Court during the trial: it becomes a matter of paramount importance, that the pleadings should be so framed, as to render the relevancy and irrelevancy of testimony obvious, and consequently its admissibility or inadmissibility easily determined; as such determination must be made in the hurry and bustle of the trial. In this prime requisite, the Common Law Pleading is greatly superior to the Civil Law Pleading; as it separates questions of fact from those of law, and presents the precise question to be determined, thereby indicating the evidence required to prove it, as also the rebutting evidence. Whereas, when detailed statements by the Plaintiff and Defendant are permitted, as under the Civil Law Pleading, the exact point in dispute will often be left so obscure, that the evidence must be latitudinous and vague, and many topics introduced in

the testimony which have nothing to do with the real questions in dispute.

There is no part of the practice of the law more important than that which relates to the admission and rejection of evidence. For there can be no security for rights, however clearly they may be defined in the system of jurisprudence, if in judicial proceedings improper evidence is admitted and proper evidence rejected. And it can only be under a system of pleading where single issues are formed, that there can exist a distinct and definite law of evidence by which the admissibility and inadmissibility of evidence is to be determined. This is exemplified by the difference between the law of evidence under the Common and the Civil Law. Under the Civil Law it is vague and uncertain; while under the Common Law it is precise and plain. Lord Campbell, the present Chief Justice of England, though a great admirer of the Civil Law, when speaking of the principles of the Common Law which regulate the admission and rejection of evidence, is constrained to say: "These place the English law, for once, above the Civil law itself, which notwithstanding its general exquisite good sense, is here arbitrary and capricious." Lord Bacon too, even in his day, noted the superiority of the Common Law in regard to evidence: "For trials (says Bacon) no law ever took a stricter course that evidence should not be perplexed, nor juries inveigled, than the Common Law of England; or, on the other side, never law took a stricter or more precise course with juries, that they should give a direct verdict." It is thus seen that a definite law of evidence is an off-shoot from the system of Special or Common Law Pleading.

The Student has, now, it is hoped, discerned the peculiar and distinguishing character of the Common Law Pleading which gives certainty to trials at law: by making the questions to be decided precise; the admission and rejection of evidence definite, and easily determined; and retaining on the record, after the trial, precision in every step from the

Summons to the Judgment. So that it can be known what was in dispute, what was proved, and what was adjudged.

I will look still further into the Common Law Pleading, with a view to exhibit the cardinal defect which the Simplification was intended to remedy, so that the Student, by knowing what was the great evil it was intended to avoid, as well as, what is the special object it was intended to accomplish, may the more readily understand the simplified pleading.

The system of Common Law Pleading is a natural system. Considered with reference to its leading principle, it will be found to be the natural logical process which the mind is necessitated, by the very laws of thought, to pursue in the analysis and evolution of any question whatever. The plaintiff states his cause of action. The Defendant is then placed in the ordinary logical dilemma of either denying or confessing and avoiding the Plaintiff's case. And the Plaintiff is then in the same dilemma. And so alternately, through every stage of Pleading. Now, this is the ordinary logical operation which the mind is necessitated to pursue in every subject of investigation.

But in order to regulate this logical process of alternate statements by the Plaintiff and Defendant, so as to secure the practical results of proper litigation, it has been found necessary to have fixed Rules and Forms. These Rules and Forms are all designed, with reference to the great end of bringing the parties to specific issues of an affirmative on one side and a negative on the other, which can be easily comprehended by the Court or the jury who are to decide them. These Rules and Forms make up the whole system of Pleading; and it is these Rules and Forms simplified, together with some substitutions and additions, that constitute the simplified Pleadings; as will be seen when we come to consider them.

The Rules of Pleading are the regulative principles which the experience of Courts has found the most efficient and convenient, for conducting the logical process, and for

framing the modes of stating a cause and the defences in the business of disputes at law. These Rules, as we shall presently see, divide themselves into two classes: those which relate to Substance, and those which relate to Form.

The Forms of Pleading are the authoritative modes in which the allegations of alternate pleadings are stated. It is these Forms that give to the system of Pleading its practical efficiency. Without fixed Forms, the application of the Rules of Pleading would be exceedingly precarious. Indeed, well-contrived Forms are the consummate excellence in every department of legal practice. As Conveyancing is nothing without Forms, so is Pleading nothing without them. Forms are the only contrivance to secure precision, certainty and facility.

The Rules and Forms of Pleading are eminently auxiliary to the mind of the lawyer in the analysis which is required in the investigation and preparation of a cause for trial, as well as, for stating the results of that analysis in the alternate allegations on the record. A case never appears so definite to the practitioner as when he is puting it into the Forms of Pleading. Then it reveals itself. And the help of Rules and Forms enables the Court, in the hurry and bustle of a trial to see through the case, to sift and assort the materials of which it is constituted better than any other possible device.

But, in constructing the system of Pleading there were times, when the love of mere art took the place of practical considerations. Pleading came to be pursued for its own sake; and the nice devices of the system, considered merely as an abstract art, became all in all to the enamored pleader, without any thought of its being an instrument of administering justice. In this way elaborate refinements were engrafted on the system, that encumbered it and embarrassed its practical efficiency. Rules were established for framing these mere refinements, as well as Rules for framing the substantial parts of the Pleadings. In this way two sets of Rules arose; Rules which relate to Form, and

Rules which relate to Substance. The Rules which relate to Form were more numerous than those which relate to Substance. And it was the just reproach of the system, that it had a strong tendency to decide causes upon points of mere Form. This was a great evil. If it be possible, a suitor should never be turned out of Court for mere defect in Form, when there is a substantial cause of action set forth in his Pleading. It was the great purpose of the Simplification to correct this evil in the old Pleadings of deciding cases upon mere matters of form, or of delaying their ultimate decision, by raising questions of mere form. A great many Rules, which relate to Form, have been eliminated from the system by the Simplification, thereby diminishing the difficulty of acquiring a knowledge of it, as well as rendering the system more effective as a mean of judicial investigation.

Form holds so important a place in the old Common Law Pleading, that it is necessary we should have a precise idea of its meaning, in order to understand fully the difference between the Rules which relate to Substance and those which relate to Form.

The broadest distinction of Form is that of its contrast with Substance. And such it is in its abstract sense. But we are not dealing with abstractions. We are within the sphere of practical realities. And in this sphere, there is, as a general fact, no such thing as Form without Substance, or Substance without Form. But the Common Law Pleading does contain a Form which has no substance, *i. e.* a Form *which is wholly independent of the merits of a cause of action or of a defence.* In the language of Pleading, substance means merits; and therefore there can be, in Pleading, a Form without Substance, *i. e.*, without merits. The Form which does not relate to merits is called Technical Form; and all the statements in Pleading of this character are said to be *purely formal,* i. e., *independent of the merits of the cause.*

By referring to the Statutes, which have from the earliest times been passed in England to remedy the evil of ad-

herence to mere technical Form, it will be found, that the distinction is, as I have stated it, between *Form* and *Merits*. These Statutes make the distinction between defects in the "very right of the cause and the matter in law appearing on the Pleadings," and "formal defects, imperfections, omissions, defaults in Form, and lack of Form." The Form which does not embody the merits of the cause might, under the old system of Pleading, be disregarded; and except upon its being objected to by a special demurrer, the Pleading would be good, and such formal defect be of no account.

But there is what may be called *Form of Substance*, which necessarily results from the differences between different causes of action, and the differences between different defences. Different causes of action, and different defences must, of course, be stated in different words. And as different facts constitute different causes of action or defences, so do the different words, in which they are expressed, constitute different forms of statement. And as one certain combination and order of particular words must express the cause of action or defence more accurately than any other, this combination and order of words are the best form in which the cause of action or defence can be expressed. And such a form should be a precedent for all similar cases. For certainly, it is more convenient to use such forms, than to let each pleader state his case in his own less perfect way. *Forms of Substance* are therefore retained in the Simplified Pleading to answer the important ends which such forms subserve. For though useless Forms have been abolished, it were a reproach to any enlightened law-reform, to suppose that it retained or prescribed no Forms at all.

I have thus shown, that the system of Common Law Pleading, which has been simplified, is a natural system composed of rules and forms which have been found by experience, best adapted for regulating the respective statements of the litigating parties, and ascertaining the real points for decision: but that many of the rules had nothing to do with the merits of the cause, but created and upheld

artificial distinctions and forms which embarrassed Pleading as a practical mean of litigation; and that the great end, intended to be accomplished by the Simplification, was to disencumber the system of these rules and artificial forms.

With these retrospective and prospective considerations, it is hoped that the Student is prepared to enter upon the study of the simplified Pleading, with more intelligence than if he had been brought abruptly upon a system, that has relations to another system which is necessarily constantly referred to, without knowing what those relations are or what the peculiarities of that system were.

THE SIMPLIFIED PLEADING.

I will now enter upon the consideration of the second chapter of the Act of Simplification, which begins at the thirty-fourth section of the Act.

The second chapter of the Act of Simplification embraces: the Fundamental Rules regulative of the alternate statements by Plaintiff and Defendant; and the Rules for framing the machinery, which constitutes the system of Pleading that peculiar contrivance, by which, a special issue, either of law or of fact, is always formed and presented, for determination, to one of the tribunals of which a Common Law judicial institution is composed—the Court or Jury. The reader has already anticipated, that this peculiar feature of Common Law Pleading, from the importance which I have ascribed to it, would be embraced in the Simplified System. Accordingly, it is laid down, as the Fundamental Rule of the Simplified System, in the thirty-fourth section of the Act, in these words:

"FUNDAMENTAL RULE."

34. "The Pleadings shall be so conducted, as to evolve upon the record by the effect of the allegations themselves,

the questions of law and of fact disputed between the parties, and present them as the subject-matter agreed upon for decision."

The Court has, therefore, at the very head of the Chapter on Pleading, continually before its eyes, the Fundamental Rule of the whole system to guide its judgment in moderating and controlling the contending statements of claim and of defence, through the whole series of allegations. And the Bar, too, in framing the alternate Pleadings, are ever kept in mind that they must conform to the requirements of this paramount rule of the whole series of Pleadings, in their alternate order.

The Act of Simplification next propounds the General Rule, by which the foregoing Fundamental Rule is made effective in practice. This Rule is embraced in the thirty-fifth section, which is as follows:

"GENERAL RULE."

35. "The Plaintiff shall first state his cause of action in a Declaration. After the Declaration, the parties shall, at each stage, demur, or plead by way of traverse, or by way of confession and avoidance. And in case a party does neither, but confesses the right of the adverse party or says nothing, the Court shall give judgment for the adverse party."

This General Rule connects the foregoing Fundamental Rule, with all the subsequent Rules embraced in the Act of Simplification, and through the machinery of a Declaration, a Demurrer, a Traverse and a Confession and Avoidance, makes all these Rules auxiliary to the great purpose of forming an issue in law or fact for decision. This Rule requires the Plaintiff to state his cause of action in a Declaration, and requires the Defendant to object to the Declaration, by one or other of three modes of defence allowed by the Rule. And which ever mode of defence, the Defendant

uses, will lead to the formation of a distinct issue, according to the requirements of the Fundamental Rule. The Demurrer will lead to an issue in law; the Traverse will lead to an issue in fact; and so will the Confession and Avoidance.

Thus, it is seen, that whatever course is taken in Pleading, the parties will be under the guidance of the Fundamental Rule requiring the formation of a specific issue. This, they are compelled to form, or else by the General Rule, or thirty-fifth section, judgment shall be given against the party declining or neglecting to do so.

Having thus shown how the principle of forming an issue controls the use of the machinery of Pleading, I will now proceed to consider the Rules descriptive of the machinery of Pleading. This machinery consists of the Declaration, the Demurrer, the Traverse, and the Confession and Avoidance.

It must be noted, that the Rules, which we are about to consider, are those descriptive of the machinery of Pleading; and not the Rules for framing the machinery. These Rules will be considered afterwards, as they stand, afterwards, in the Act of Simplification.

In the order of law practice, the Rules descriptive of the Declaration would come first under consideration: but the Act of Simplification, for the advantages of a more lucid order, has not placed them first; and I shall consider them in the order in which they stand in the Act.

Following the order of the Act of Simplification, I will first consider the Rules descriptive of the Demurrer.

OF DEMURRER.

It is proper, as a little reflection will show, to consider the Demurrer before any other part of the machinery of the Simplified Pleading; because it was the Demurrer, by which, all the objections, for defects of mere form, were

made under the old system of Pleading. Therefore, in defining the scope of the Demurrer under the new system, we are, at once, led to see the characteristic difference between the old system and the new; which is that no objection, for mere formal defects, can be made under the new. The Demurrer, therefore, under the new system is stripped of the function of making formal objections to a Pleading. Under the new system its function is confined to making objections to defects of substance. If a good cause of action be set forth in the Declaration, or a good defence in the Plea, or a good reply in the Replication, and so of every other Pleading, no matter how informal the Pleading may be, it is not liable to Demurrer. The difference in the scope of the Demurrer under the old and the new system, represents accurately the difference between the two systems. All the different forms of action, and the innumerable technicalities to which they gave rise throughout the whole course of the Pleadings down to the judgment inclusive, together with the other mere technical forms of the old system, are abolished, as we have already seen, and will more fully see, and consequently do not now exist to be objected to by Demurrer. Neither does the violation of any Rule, which relates merely to form, that is prescribed by the simplified system afford ground for Demurrer. The Court under the Act of Simplification has such ample power of amendment, as we shall see, as to be able to compel the parties to plead in such a way, as to conform to that *form of substance*, which I have expounded in the preliminary remarks of this chapter, and which is exemplified in the simplified Forms given in the Act of Simplification, which will be considered in the next chapter of this book. The practical advantages, in thus getting rid of the delays, and perplexities heretofore attendant upon demurrers for defects in form will be manifest.

But while the Act of Simplification has abolished Demurrer for defects of form, it has made the Demurrer, for substance, special. Under the old system, a general De-

murrer, which specified no particular defect, but merely stated generally that the Pleading demurred to was insufficient in law, was all that was required to reach defects in substance in a Pleading. The Simplified Pleading has changed this, and makes the party demurring, state in what particular, the Pleading is defective in substance. It may, however, sometimes happen, that the general statement of a General Demurrer may be as specific as the case will admit of. In order not to be embarrassed by the occurrence of such a case, the Simplified Pleading provides that the party demurring shall first state that the Pleading is bad in substance, and then state some question of law involving the point which he intends to argue on the Demurrer. This mode, for which a Form is given in the Act, will suit all cases and obviate every practical difficulty as to precision in the statement of the cause of Demurrer. The very reasons, which books on Pleading give for the use of a general Demurrer, show that it ought never to have been tolerated, and that the Act of Simplification is wise in excluding it. "Where a General Demurrer (says Stephen, p. 160,) is plainly sufficient, it is more usually adopted in practice; because the effect of the special Form being to apprise the opposite party more distinctly of the nature of the objection, it is attended with the inconvenience of enabling him to prepare to maintain his Pleading in argument, or of leading him to apply the earlier to amend." Surely, no such ambuscades, as a general Demurrer is here described to be, ought to be allowed in proceedings devised for the administration of justice.

The doctrines which we have been considering, and the Rules enforcing them, are embodied in the thirty-sixth, thirty-seventh and fortieth sections of the Act of Simplification. The sections are as follows:

36. "Either party may object by Demurrer to the Pleading of the opposite party, on the ground that such pleading does not set forth sufficient ground of action, defence, or

reply, as the case may be. But no pleading shall be deemed insufficient for any defect which could heretofore only be objected to by special demurrer, nor for the violation of any rule hereinafter prescribed which relates only to form, unless specially provided for."

37. "Every Demurrer shall particularly express the causes of the same, not in general terms, but in a specific statement, of some point of law showing in what respect the pleading is insufficient in substance. And the form of a Demurrer shall be as follows, or to the like effect:

"The Defendant (*or Plaintiff*) by his Attorney (*or in Person*) says that the Declaration (*or Plea, &c.*) is bad in substance;"

and some substantial matter of law intended to be argued showing the defect in the pleading shall then be stated; and if any Demurrer without such statement, or with a frivolous statement, shall be filed, it may be set aside by the Court, and judgment may be entered up for want of a plea.

40. "When issue is joined on Demurrer, at any stage of the cause, the Court shall consider the allegations through the whole series of pleadings, and give judgment according as the very right of the cause and matter in law shall appear unto it, without regarding any imperfection, omission, defection, or lack of form, for the party who on the whole appears to be entitled to it. And no judgment shall be arrested, stayed or reversed for any such imperfection, omission, defect or lack of form."

It is observable, that, by the last clause of the thirty-seventh section, if a Demurrer, not conforming to the Rule prescribed in the section, shall be filed, the Court may set it aside, and give judgment for want of a plea.

And by the fortieth section, it is seen, that the Court,

upon issue joined on Demurrer, at any stage of the cause, shall look through the whole case and give judgment according to the real merits in law of the case, without any regard to defects of form: and this means, not only what would be defects of form under the old system, but what are defects of form under the new; as appears by these concluding words of the thirty-sixth section: "nor for the violation of any rule hereinafter prescribed which relates to form, unless specially provided for;" and there is no special provision for any formal defect.

The thirty-eighth section of the Act of Simplification prescribes the form of a Joinder in Demurrer; and is in these words:

38. "The Form of a Joinder in Demurrer shall be as follows, or to the like effect:

"The Plaintiff (*or Defendant*) says that the Declaration (*or Plea, &c.*) is good in substance."

When the one party has filed in the cause a Demurrer in the Form prescribed by the thirty-seventh section, and the opposite party has filed a *Joinder in Demurrer in the form prescribed by this section, the case is ready for trial on the law; because the facts stated in the pleading demurred to, are admitted; as is seen by the thirty-ninth section of the Act, which is as follows:

39. "Every Demurrer shall be taken as a confession of all the facts pleaded without regard to form."

Under the old Common law pleading, a Demurrer confessed all matters *formally* pleaded, but not such as were informally pleaded. But as the Statutes of 27 Elizabeth, ch. 5; and 4 and 5 Anne, ch. 16, made it necessary to object

* N. B. It is not necessary to file a Joinder in Demurrer at all; as an issue in law is formed without it.

specially to defects of mere form, and no longer allowed them to be raised upon a general Demurrer: by force of these Statutes, a general Demurrer would confess all matters pleaded *informally* as well as those pleaded formally. (1st Saund. R. 337, note 3.) So by this section of the simplified pleading, all matters are confessed by a demurrer without regard to form.

By the forty-first section of the Act of Simplification, there shall not be a Demurrer upon a Demurrer; because there is already an issue in law to be decided. This was the old law.

41. "There shall not be a Demurrer upon a Demurrer."

OF THE EFFECT OF PLEADING OVER WITHOUT DEMURRER.

It may sometimes happen, that a party may overlook a substantial defect in his adversary's pleading, and instead of demurring, plead to it. It thus becomes necessary to provide for such a contingency. The Act of Simplification contains two rules on the subject, which answer all the exigencies of such cases. The first is, that where the Declaration is defective in substance, and the defendant pleads over, and his plea supplies, by express statement, the defect in the declaration, such defect shall be thereby cured. Thus, in an action of trespass for taking a hook, where the plaintiff omitted to allege in the declaration, as he should have done, that it was *his* hook, or even that it was in his possession, and the Defendant pleaded a matter in confession and avoidance justifying his taking the hook out the *Plaintiff's hands*, the Court, on motion in arrest of judgment, held that as the plea itself showed that the hook was in the possession of the Plaintiff, the objection, which would otherwise have been fatal, was cured. (Steph. Plead. p. 165.) In this case it appeared clearly to the Court, from the pleadings, that

the Plaintiff was entitled to recover. But the rule should be confined, as it is in the Act of Simplification, to an express statement in the plea of the fact omitted, and not extended to an implied statement or admission of the fact. And it is confined, too, in its scope, to a mere omission of some fact or facts; otherwise the rule would have trenched upon another rule, which will be considered hereafter, that *a Plaintiff must recover upon the ground stated in his declaration, and not upon another disclosed by the Defendant's plea.* The Rule under consideration is contained in the forty-second section of the Act of Simplification, which is as follows:

42. "If a declaration be defective in substance, and the Defendant pleads over; and the plea supplies, by express statement of fact, but not otherwise, the defect in the declaration, such defect shall be thereby cured."

The other Rule on this point is that when the issue joined necessarily required, on the trial, proof of the facts omitted or imperfectly stated, the defect shall be cured by verdict. It is futile to object, after trial, to an omission in the statement of a cause of action, when the cause of action has been found by a jury upon proof of it. This rule, however, should be applied, by the Court, with great caution. It lies so nearly upon the boundary between expediency and inexpediency, as to require circumspection in applying it to cases as they arise. The rule is embodied in the forty-third section of the Act of Simplification, in these words:

43. "Where there is any imperfection, or omission whatever in any pleading, which would be a fatal objection on Demurrer, yet if the issue joined be such as necessarily required on the trial proof of the facts so imperfectly stated or omitted, such imperfection or omission shall be cured by the verdict."

OF TRAVERSE.

The Traverse or Denial is the piece of the machinery of Pleading which next comes under consideration. This is by far the most important plea in the whole system; because of its more frequent use than any other. Great difficulty, too, has been experienced in all eras of the law in developing its principles, and forming Rules for its practical guidance. The Act of Simplification has made great changes in this part of Pleading. In the old system, there were a great many forms of Traverse called General Issues, and the Replication *de injuria*, (Steph. Plead. 172–5;) and also a Special Traverse with an *absque hoc*. (Steph. Plead. p. 188, 198.) By the Act of Simplification, all those forms of Traverse are abolished, and two forms only are substituted in their stead.

The reasons for this change are these. The General Issues, instead of being alike in their scope, as their common name would import, were extremely diverse. Under some of them, almost any legal and equitable defence might be given in evidence. They merely denied *liability*, and any thing which tended to show no liability could be offered in evidence. This virtually abrogated the fundamental distinction between pleas by way of Traverse, and pleas by way of Confession and Avoidance; which the system of Pleading was studious to preserve in theory, because the exigencies of fair trial require it, and yet in these General Issues it practically disregarded it. In the most comprehensive General Issues, while the *plea* was in *denial*, the *evidence* was often in *confession and avoidance*. Thus the proof did not conform to the issue; as it always ought to do, to insure fair trials without surprise to either party. And besides, as the General Issues differed in comprehensiveness, a great many questions as to the admissibility of evidence, thereby arose in practice. Under some General Issues, any defence, as I have already said, could be given

in evidence. But others were somewhat narrower, and others narrower still; until the *form* of the issue, from being nothing, because it admitted every thing to be proved, became every thing, because it admitted scarcely any thing to be proved. These anomalies in the doctrine of General Issues led to uncertainties in practice, and difficulties as to the admissibility of evidence. And besides, little might be known to either party, under these General Issues, of what would turn out to be the real question between them. The Plaintiff might be entirely in the dark as to the matters to be set up in answer to his claim; and thus be exposed to defeat from facts, which, if he had known them, would have induced him to abandon his case, and thereby save the trouble and expense of a trial.

I will now explain the nature of the Special Traverse with an *absque hoc*. The reasons for abolishing it will appear, when we come to consider the form of plea which has been substituted for it, in the new system.

The great object of Pleading, as I have endeavored to show, is to bring the parties, as soon as practicable, to a definite issue or question which involves the whole matter in dispute. In order to do this, the Courts have built up the system of Pleading in such a form, as to require the parties so to state their cases, that the allegations of the one party shall be answered, by the other, *directly;* and not leave the sense to be collected by inference or argument. The Courts, therefore, established it as a fundamental rule, that every affirmative shall be answered by an express and *direct* denial. On this ground is based the rule against, what is called, *argumentativeness*, which means that no plea shall be argumentative, or a mere *indirect* denial. The rule excludes all *indirect* denials.

But the purposes of justice sometimes require that matter, which is merely an *indirect* denial of the adverse allegations, shall be pleaded specially. It is sometimes important, that the special matter, of the defence relied on, should be stated in the plea, in order that the Plaintiff may have the privi-

lege of demurring to it, if he thinks it insufficient in law as a defence; without the delay, expense and trouble of raising the same question of law, by a prayer to the Court, upon the same facts when brought out by the Defendant in evidence upon a trial before a jury. It was to accomplish this purpose, *without violating the rule against argumentativeness*, that this peculiar species of plea was invented by the subtle ingenuity of the ancient pleaders. The plea consists of two substantial parts: an *Inducement*, and an *Absque hoc*, as they are respectively called. The Inducement contains the special matter, which is an *indirect* denial of the Plaintiff's case. The Absque hoc contains a direct denial of the Plaintiff's case; and is added to the *indirect* denial contained in the Inducement, to conform the plea to the rule against argumentativeness, which requires that every pleading by way of Traverse shall be a *direct* denial of the adverse allegation. As this special matter was pleaded in the Inducement merely to enable the Plaintiff to *demur* to it, he could not *plead* to it; and if he did not choose to demur, he could only reply to the Absque hoc, by merely repeating the allegations of the Declaration, which the barbarous formula of the Absque hoc denied *directly*. This was the most artificial and subtle plea of the ancient system of Pleading; and though it was seldom used, still it was essential to a complete system of Pleading in facilitating the settlement of cases that sometimes occurred in the administration of of the law.*

That peculiar form of Traverse called the Replication *de injuria* is also abolished by the Act of Simplification. This species of Traverse was confined to actions of *Trespass* and *Trespass on the case;* and even in these actions could only be used in the Replication. This Replication alleged that the Defendant did the act complained of, *of his own wrong, and without the cause alleged.* In the two actions mentioned, this was the proper form of replication whenever the plea in bar was traversed by the Plaintiff. But yet, if the plea

*See the Form of a Special Traverse, Steph. Plead. p. 190.

in bar consisted of matter of either *title* or *interest;* or *authority of law;* or *authority in fact* derived from the Plaintiff; or *matter of record:* this replication could not be used. (Step. Plead. pp. 186, 188, 276, 383.) It is sufficiently manifest that this form of traverse makes distinctions between defences where none exist in the nature of things; and is an extreme anomaly even in the old system of Pleading.

These different forms of Traverse are abolished, and two other forms substituted for them, by the forty-fourth section of the Act of Simplification, in these words:

44. "There shall be only two forms of Traverse, viz.: a Direct Traverse, and an Indirect Traverse. The General Issues, and the Replication *de injuria*, and the *Formal Traverse with an *Absque hoc* shall not be used."

I will now proceed to consider what has been substituted, for the General Issues and the Replication *de injuria*, in the Simplified Pleading. And then I shall consider the substitute for the Formal or Special Traverse.

OF DIRECT TRAVERSE.

The Act of Simplification has substituted for the General Issues, a Direct Traverse consisting of a direct denial of the facts alleged by the opposite party. By this form of denial, the evidence is conformed to the issue; and the anomalies, relative to the admissibility of evidence under the General Issues, are removed from practice. No evidence can be adduced by the Defendant but such as tends to contradict, that is, negative, the allegations of the Plaintiff. Matter of excuse or justification, or of discharge or release, cannot be adduced under the Direct Traverse. The Rule, regulating the matter, is contained in the forty-fifth section of the Act of Simplification, in these words:

* The Special Traverse is also called *Formal.*

45. "A Direct Traverse shall consist of a direct denial of the facts alleged by the opposite party; and it shall always be expressed in the negative, unless opposed to a precedent negative, then it may be expressed in the affirmative."

In order to bring the Replication *de injuria*, or rather the instances or cases in which it was the proper form of traverse under the old system, within the principles of the Direct traverse, the Act of Simplification makes it imperative on a Plaintiff, in all actions for injury to person or character or property, when matter of excuse or justification is pleaded by the Defendant, to deny in his Replication, the excuse or justification pleaded, in the words of the excuse or justification; as was done even under the old system, as I have shown, when the Defendant's plea consisted either of matter of *title* or *interest*, or *authority* of *law*, or *authority of fact* derived from the plaintiff, or *matter of record*. There is no reason in the nature of the special cases of *Trespass* and *Trespass on the case*, for a peculiar form of traverse, in replying to a Defendant's plea of *excuse* or *justification*. The Act of Simplification therefore conforms these cases to the General System, by a Rule in the forty-sixth section, in these words:

46. "Where, to any action for injury to person or character, or property, any matter of excuse or justification is pleaded, the Plaintiff shall, in the Replication, deny it in the words of the excuse or justification or to the like effect, or may plead some special defence."

OF INDIRECT TRAVERSE.

I will next consider what has been substituted in the simplified pleading for the Special Traverse with an *absque hoc*. In order to understand the substitute, it will be well, to refer to what has been said of the purpose for which the

Special Traverse was devised. It was to enable the Defendant to plead the special matter of his defence, in order that the plaintiff might know what it is, and if he thought it insufficient in law as a defence, demur to it, and draw out the question of law from the issue of fact, and, perhaps, have the case decided, without the trouble and expense of a jury trial. But under the old system of pleading, special defences, which amount to an *indirect* denial, could not be pleaded except in the barbarous form of a Special Traverse with an *absque hoc*. As it will sometimes, though not often, happen, that special matter amounting to an *indirect* denial should be pleaded, the Act of Simplification has devised a mode of pleading an *indirect* denial without any of the technicalities which encumbered it under the old system. The new mode of pleading the *indirect* denial, of course, violates the rule against *argumentativeness*, as any such form of plea necessarily must. But the supposed evil of such violation is prevented, by the rules which regulate the reply to such a pleading under the new system. The purpose of the rule against argumentativeness was to compel the parties to come to issue. It supposes that if indirect denials were allowed, the parties might plead on alternately, and never come to issue. But this difficulty is prevented, under the new pleading, by compelling the Plaintiff, when an indirect denial is pleaded to his declaration, if he does not demur to it, to deny its allegations *directly;* or else plead some matter of excuse or justification or discharge; and in either case, the Defendant shall join issue. By either of which Replications and Joinder by the Defendant, an issue will be formed. And thus the purpose of the Special Traverse is accomplished, without any of its embarrassments. The Direct Traverse, however, will be generally used, and therefore is the more important plea. The Rules regulating the Indirect Traverse, are embraced in the forty-seventh and forty-eighth sections of the Act of Simplification, in these words:

47. "All defences, except a direct denial of the facts alleged, shall be pleaded specially."

48. "Wherever a Defendant shall plead special facts which deny indirectly the facts alleged by the Plaintiff, if the Plaintiff do not demur, he shall in the Replication, either deny directly the special facts so pleaded, or plead some matter by way of confession and avoidance, and in either case the defendant shall join issue."

It must be obvious to the reader, from the provisions already passed in review, that the primary object of the Act of Simplification is to produce special issues regulated by the principles of common logic, and unfettered by artificial technicalities; so that the admissibility of evidence, to prove or disprove the affirmative of the issue, can be judged of by our natural reason; the evidence being conformed to the ordinary meaning of the language of which the issue is formed. If the affirmative, for example, be a promise, and the Defendant denies the promise, all the evidence will be confined to the simple issue, of *promise* or *no promise*. With a view to accomplish this purpose, all the General Issues (which were certain pleas of Traverse appropriated, by ancient usage, as the different forms of general denial, to the different forms of action,) are abolished; as we have seen. But this does not reach the evil of the class of cases to which the general issue of *Non-assumpsit* applies. Because the plea must still be, virtually the same; as a promise would be still alleged in the Declaration, and must be denied. The action of *Assumpsit*, as it was called, was the proper remedy for the breach of all simple contracts, whether express or implied. In cases of *implied* contracts the promise was a mere fiction; and yet all the Pleadings were framed as if there was a promise in fact. There had been established, as a principle of law, that a *promise* must be *implied* wherever there is an existing debt or liability. This was done by the Courts in order to bring, a large class of cases, within the scope of the action of *Assumpsit*, which could before only be reached by an action of Debt. The Declaration stated the special facts of

the case showing the indebtedness or liability; and then said, that being so indebted or liable, in consideration thereof, the Defendant *made a certain promise* to the Plaintiff.

The General Issue then was, That the Defendant *did not undertake and promise* in manner, &c, which is called the plea of *Non-assumpsit.* According to the language of the plea, it merely denies the fact of the *promise* set forth in the Declaration. But as the law implies a promise, wherever there is an existing debt or liability—and the Declaration set forth facts showing such debt or liability, the Plaintiff maintained his action not by proving a promise, as there was in fact none, but by proving the debt or liability on which the implied promise was raised by the law; and the Defendant was of course, under his plea of *no promise*, allowed to prove any circumstance which tended to disprove the debt or liability; such as performance or a release, &c. This being the necessary scope of the General Issue in implied promises, the Courts extended it to express promises. Therefore, in any case of Assumpsit, the Defendant could under the General Issue show not only that no promise was made, or that the promise was an invalid one; but could show any matter, with few exceptions, which tended to deny the debt or liability. Until then, the principle of law, *That an existing debt or liability implies a promise*, be changed, the scope of a plea of *no promise* must be the same as the General Issue, *Non-assumpsit.* This principle of law is so pervasive of our books on contracts, that it cannot be changed. The Act of Simplification has, therefore, remedied the evil, by changing the mode of Pleading in cases of implied contracts or promises. By the fifty-third section, which will be reviewed hereafter, the statement of *promises* in Indebitatus counts, as counts or declarations on implied promises are called, shall be omitted. And by the hundred and thirty-seventh section of the Act, the Forms of Declaration, from one to twelve inclusive, have been prescribed for the cases where under the old system, were declared on implied promises. And by the same section of the Act, a

Plea has been prescribed, applicable to these Declarations, in these words: "That he never was indebted as alleged." By these forms of declaration and this form of plea, a special issue is formed according to the real facts of the cases, where *promises* were, under the old system, *implied* and made the basis of the Pleadings. The Pleadings confine the parties to the indebtedness or liability, as was the case before the doctrine of implied promises was invented by a perverse ingenuity.

In cases of *express* promises, the promise must be stated in the Declaration; and the Act of Simplification has prescribed two forms, 13 and 14, as examples; and has prescribed a Plea in such cases where the promise is denied, "That he did not promise as alleged." Under this Plea, though it is equivalent in language to the General Issue of *Non-assumpsit*, the parties are confined to *promise* or *no promise*. Because by the fiftieth section of the Act of Simplification, which will be presently considered, all matter of justification or excuse, or of discharge or release, shall be pleaded specially, and consequently can never be given in evidence under any Plea of Traverse. But as, notwithstanding the fiftieth section, any matter, such as *duress* and other like matter which shows that there never was a *valid* promise, though there was a promise in fact, might be given in evidence under the plea prescribed for express promises, it was necessary to institute a Rule requiring them to be pleaded specially. The Act of Simplification has, therefore, by the forty-ninth section, required such matters to be pleaded specially. The section is as follows:

49. "Any defence, showing that a parol contract or deed sued on is void or voidable, or the fact that the alleged deed was delivered to a third person as an escrow, shall be pleaded specially."

This section of the Act of Simplification also narrows the issues in cases of implied promises, to which under the

Simplified Pleading, the Plea, "That he never was indebted as alleged," is prescribed as a General Traverse. Because the logical import of the Plea is such, that any matter which tends to show, that there never was a *valid* liability—such as fraud, infancy, coverture, lunacy and the like—could be given in evidence under it, in cases where such matters would be a defence. And implied promises, though no longer declared on as such, are not abolished, and are embraced in the section under the designation, "Parol Contract." (1st Chit. Plead. p. 87.) Therefore all matters which show that the liability or obligation is void or voidable, must be pleaded to any one of the twelve declarations prescribed for such cases; and cannot be given in evidence under the general Plea prescribed for them.

This section is seen to embrace cases of deeds as well as parol contracts, sued on, and requires any defence showing the deed to be void or voidable, or that it was delivered as an escrow, to be pleaded specially. Under the old system of pleading, Debt was the proper form of action on a sealed instrument or deed. And if the Defendant was a party to the deed and wished to traverse it he was compelled to plead *non est factum;* as this was the General Issue established by ancient usage to such action. Under this Plea, the Defendant might contend, either that he never executed the deed, or that its execution was absolutely void by reason of lunacy, infancy, coverture or other like disability, or that he delivered it as an escrow. Now, in the Act of Simplification, as we shall see hereafter, there is a Plea, "That the alleged deed is not his deed." This Plea must have the same scope as the General Issue *non est factum*, unless it be limited by some express rule. Because, under it, any matter showing that the deed was void or was delivered as an escrow could be given in evidence, just as under the General Issue for which it has been substituted, and to which it is equivalent in language.

In order, therefore, to draw out the defences of duress, infancy, lunacy, coverture, delivered as an escrow, and

other like matters, from the General Traverse formed by the Simplified Plea which we have been considering, into the Pleadings, it was necessary to have the Special Rule contained in the forty-ninth section of the Act of Simplification.

Uniformity, too, is gained by the Rule contained in this section. Under the plea of *Non-assumpsit*, matters which show the contract to be void or voidable could be given in evidence; but under the plea of *non est factum*, matters which show the deed to be void could be given in evidence, while matters which show it to be voidable only could not, but must be pleaded. (Steph. Plead. p. 177, note X.)

OF CONFESSION AND AVOIDANCE.

The next subject to be considered in the order of the Act of Simplification, is the pleas of justification and excuse, and of discharge and release, called pleas by way of Confession and Avoidance. The pleas of justification and excuse confess the act charged: but avoid it by showing that the Plaintiff never had any right of action, because the act charged was lawful; as that the battery charged was in self-defence. The pleas of discharge and release admit that the Plaintiff once had a right of action, but avoid it, by showing that it is discharged or released by some matter subsequent. (Steph. Plead. pp. 219–20.) As a great leading purpose of the simplified pleadings is to make the evidence conform to the form of the issue in every case, matters of Confession and Avoidance cannot be given in evidence under the issue formed by a traverse in any instance whatever. For if the Defendant be charged with an express promise, and only such promises can now be declared on as promises, and his case be, that after making the promise it was *released* or *performed*, this plainly *confesses* and *avoids* the declaration; and to allow the Defendant, to give this in evidence, under the *denial of a promise*, as the old pleadings did, is to lose sight of the distinction between the two great classes

of pleas in bar, those by way of *Traverse* and those by way of *Confession* and *Avoidance;* a distinction that cannot be broken down without great damage to the just administration of the law. Such defences therefore should be pleaded. Accordingly the Act of Simplification requires such defences to be pleaded specially, as they ought always to have been from the necessities of fair trial, when the form of the issue indicates that the facts are *denied* and not *justified.* And as justification or excuse is a conclusion of law which results from a given state of facts, the facts should be set forth in the pleadings, that the Court may see whether they are a good defence, and the opposite party have the opportunity of demurring to them. The rule regulating pleas by way of Confession and Avoidance is embraced in the fiftieth section of the Act of Simplification, in these words:

50. "Any ground of defence, that admits the facts alleged in the Declaration or in any other pleading, but avoids their legal effect, by some matter of justification, or excuse, or of discharge or release, shall be specially pleaded."

In the law regulating pleas in Confession and Avoidance, there was a fiction called "Express Color." By this fiction, a plea which in reality is not a plea in Confession and Avoidance, was clothed in the garb of one by a fictitious confession which the opposite party was not allowed to gainsay though he knew it to be false. Every pleading by way of Confession and Avoidance *must give color* as it is called in technical language, that is, *must admit an apparent right in the opposite party*, and rely upon some new matter by which that apparent right is defeated. For example, a Defendant is charged with a breach of covenant. The Defendant admits in his plea, that he executed the covenant and committed the breach, and would, therefore, *prima facie*, be chargable with the damage: but alleges that the Plaintiff afterwards executed to him a release. The Plaintiff, in his Replication admits that such release was executed as alleged

in the plea; and the Defendant would thereby be *apparently* discharged: but alleges that the release was obtained by duress. In this case, the plea *gives color* to the Declaration; and the Replication *gives color* to the plea. The plea must from its very nature give color, that is, admit an apparent right; else it is not a plea by way of Confession and Avoidance. This inherent quality in the very nature and structure of a Pleading by way of Confession and Avoidance is called *implied color* in the old pleading, to distinguish it from another kind which was in some instances inserted in a pleading, to give it the appearance or form of such a pleading, called "*express color*." This express color is "a feigned matter pleaded by the Defendant in an action of trespass, from which the Plaintiff seems to have a good cause of action, whereas he has in truth only an appearance or color of case." (Steph. Plead. p. 225.) As this fictitious matter was inserted only to give the plea a formal sufficiency, the Plaintiff was not allowed to contest the fictitious matter; and as though pleading was a masquerade, the plea was introduced in disguise where, according to the facts of the case and the fundamental rules of the old system, it could not be in its naked truth. This form of plea, like the Special Traverse, was invented for the purpose of bringing the legal questions involved in the facts of the defence in the personal action of trespass in which alone it was, at last, used, before the Court, and withdrawing them from the jury. It was confined to pleas and did not extend to other pleadings. (Steph. Plead. pp. 229–30.) The Act of Simplification by the fifty-first section has abolished Express Color in these words:

51. "The fiction of Express Color shall not be allowable."

We have now passed in review, the Rules defining the functions and forms of the different pieces of the machinery of the simplified pleading. The machinery of pleading consists of the Declaration, the Demurrer, the Pleas of Direct

and Indirect Traverse, and the Plea by way of Confession and Avoidance. It has been shown that this machinery is much more simple and natural than the old. All the General Issues, with the perplexities in practice produced by their differences in comprehensiveness, have been abolished; and so has the Special Traverse with its fine-woven cobwebs of doctrine; and also that perplexing fiction of Express Color. The system of doctrine, too, has been rendered simple by abolishing anomalies and incongruities, and making uniform the admissibility of evidence, so far as it is dependent on the forms of issues. But much remains to be shown of what has been done towards simplifying pleadings. This will disclose itself more and more, as we proceed, until we reach the Simplified *Forms*, when a comparison of them with the old *Forms* will make the simplification manifest to direct inspection.

RULES FOR FRAMING THE PLEADINGS.

I will now consider the Rules for framing the respective pleadings which constitute the simplified machinery for administering the law.

The Demurrer is so simple in its form—its office being merely to raise some question of law—that it is unnecessary to say any thing more in regard to it, than has been already said. The rules and the form, by and in which, it must always be constructed have been explained. The pleader, who is to use it, is, of course, supposed to be familiar with the question of law which he purposes to raise by it. If so, he can have no difficulty in stating the question in the prescribed form.

The other pleadings, as they embody statements of facts, are more difficult of construction, than the Demurrer; and consequently, they require a large number of rules relative to the various combinations of facts which constitute causes of action and grounds of defence. Because the rules must

be moulded according to the nature of the objects which they regulate; and in proportion to the diversity of these objects must the rules be numerous and multiform; and the number of the rules, concurring to the same end, only displays the more clearly the unity of the principle which pervades the whole system. But still, the rules are not as numerous as, might, at first thought, be supposed. For the logical conditions of all the possible combinations which causes of action and grounds of defence can assume are comparatively few, and can be stated in a few rules.

The grand primary purpose, which all the machinery of special pleading is designed to accomplish, as I have shown, is to bring the parties to an issue which involves the merits of the cause. All the rules, therefore, for the construction of the different pleadings, are subordinate to this primary purpose. They direct the pleader, in whatever he does, in such a way as to accomplish this primary purpose of the whole scheme of pleading. This must be kept constantly in mind by the student while considering the rules I am about to explain.

There are certain rules that *apply to all pleadings, from the Declaration to the end of the series.* These, to prevent repetition, as well as for the greater light of systematic views, shall be considered first; then, those which *relate exclusively to the Declaration;* next, those which *apply to the pleadings subsequent to the Declaration.* Under these three heads, all the fundamental rules will be embraced. Other rules, which are merely auxiliary, will afterwards be discussed under their proper heads. And finally, the simplified Forms will be considered under the light which the whole discussion will have shed over them. This is the order in which the respective subjects stand in the Simplifying Act.

OF PLEADINGS IN GENERAL.

We now enter upon the consideration of the Rules for framing pleadings. The first thing to be considered is the material of which pleadings are, under the simplified system, to be constructed. A great many matters, which were required to be introduced into the structure of the different pleadings under the old system, are not allowed at all under the new. The fundamental rule, upon the basis of which all the other rules repose under the simplified pleading, regulating the material of which pleadings shall be constructed, is embraced in the fifty-second section of the Act of Simplification, in these words:

52. "Whatever facts are necessary to constitute the ground of Action, Defence, or Reply, as the case may be, shall be stated in the Pleading, and nothing more; and facts only shall be stated, and not arguments, or inferences, or matter of law, or of evidence, or of which the Court takes notice *ex officio*."

It is seen, that this rule is both affirmative, showing what material shall be used, and negative, showing what shall not be used. It, of course, implies that the student is already acquainted with causes of action and grounds of defence; and that he can distinguish facts from arguments and inferences, and from matters of law, and matters of evidence, and from matters of which the Court takes notice, *ex officio*. It is not the province of Pleading to teach these distinctions; for, if so, Pleading would embrace the whole system of jurisprudence. It is obvious, that it would be improper to state matters of law; because the law is involved in the facts, and the Court sees it in them *ex officio*. And that it would be improper to state mere matter of evidence, is equally obvious; for, besides being useless, it would extend the pleadings to the greatest prolixity.

The latter part of the above rule implies, that there are matters, besides those of law, of which the court takes notice *ex officio*. These are: matters antecedently mentioned in the record or pleadings; the course of the almanac; the division of the State into Counties and Judicial Circuits; the ordinary measurement of time; legal weights and measures; and other matters which are enumerated, though some of them do not pertain to Maryland practice, in 1 Chit. Plead. pp. 196–205.

This section is but a reiteration of the rule of the old system of pleading, without any new limitation. All the exclusions of this rule were embraced in it under the old pleading. But there were many matters allowed by this rule, and required by others, to be stated in pleadings, which the Act of Simplification excludes from the material for framing pleadings. Some of these are embraced in the fifty-third section of the Act, in these words:

53. "All statements which need not be proved, such as the statement of Time, Quantity, Quality, and Value, where these are immaterial; the statement of losing and finding, and Bailment, in actions for goods or their value; the statement of acts of Trespass having been committed with force and arms, and against the peace, dignity and government of the State of Maryland; the statement of taking in Actions of Replevin; the statement of Promises which need not be proved, or promises in Indebitatus counts, and mutual promises to perform agreements, and all statements of a like kind, shall be omitted."

Many of the statements embraced in this section were fictions which grew out of forms of actions, and were required to be stated in order to sustain the form of action. For example, the statement of *losing and finding*, and in some cases, *of bailment*, were absolutely necessary in Actions of Detinue and Trover, to recover goods or their value; and yet the gist of the action of Detinue was the wrongful

detention, and of the action of Trover, the wrongful conversion to the defendant's use of the plaintiff's property, without any dependence whatever upon the mode of getting possession of them, as these fictitious statements would imply. So the statement of *taking* in Actions of Replevin, and of *promises* in Indebitatus counts, from what I have heretofore said on these respective subjects at their proper places, is manifestly fictitious; and therefore irrelevant in the simplified pleadings, which aim at the exclusion of mere technical form. This rule, though stated under the general rules, applies almost exclusively to the Declaration.

The two rules or sections, which I have considered, are the only ones, under this head, which relate to the material of which pleadings shall be constructed. The others, which I will now proceed to consider, relate to the framing of pleadings so as to make them certain in their meaning and precise and simple in their form.

The first of these is embraced in the fifty-fourth section, in these words:

54. "An allegation shall not have two intendments: but it shall state one point distinctly, so that the adverse party may know on what to join issue. And if an allegation shall have two intendments, it shall, upon motion, be considered by the Court as a nullity."

This rule points at what is called a *negative pregnant*, and such like ambiguous statements. A *negative pregnant* is such a form of negative expression as may imply, or carry within it, an affirmative. And so an argumentative pleading is pregnant with, or may imply, a negative. For examples, see Step. Plea. pp. 381–4. 1st Chit. Plead. p. 461.

By the old system, a pleading inconsistent with, or repugnant to, itself, was, on that account, bad and demurrable. But if the second allegation, which created the repugnancy, was superfluous, and could be rejected without materially altering the sense, it did not vitiate the pleading. (Steph.

Plead. pp. 378–9.) In order to remedy the evil of this rule, the Act of Simplification has, in the fifty-fifth section, established the following rule:

55. "Where there are material allegations in a pleading, that are repugnant to each other, the first in order shall be considered the proper one, and all others inconsistent with it shall be rejected, even though the pleading be thereby left without an allegation of some material fact."

Under the old system, a declaration for taking and carrying away certain timber for the completion of a house then lately built, was bad for repugnancy; for the timber could not be for the building a house already built. (1st Salk. 213.) Under the above section, the words "then lately built" will be rejected, and the declaration will be good. This change in the rule was but following the general doctrine of construction of deeds. If two clauses in a deed be repugnant, the first shall be received, and the last rejected. If one make a lease for ten years at will, this is a good lease for ten years certain, and the latter words are void for repugnancy. (2d Term Rep. p. 562.) The Act of Simplification, in the above section, rejects all the repugnant allegations, even though the first allegation, because of the omission of some material fact, should be thereby rendered void. The rule could not, practically, be less thorough-going; for if the repugnant allegations be rejected at all, they must be rejected entirely, and not in part.

As superfluous matter will, sometimes, get into Pleadings, through the ignorance of the pleader, it is important that it should be so disposed of, as to produce as little mischief as possible. The Act of Simplification has provided a Rule on the subject in the fifty-sixth section, in these words:

56. "No superfluous allegation, whether it be consistent or *inconsistent* with the necessary and material allegations, nor any impertinent allegation shall vitiate a Pleading."

It may sometimes happen, that a pleading, by design or through ignorance, may be so framed as to embarrass the fair trial of a cause. It is therefore important, that the Court should have ample power over such a pleading. From the earliest times the Courts have exercised a control over their practice. They not only establish a practice for themselves, but they set aside rules of practice. The Court at one time altered the rule for computing interest. (2d Black. R., p. 696, Rice *vs.* Shute.) And when flagrant faults occur in the framing of a pleading, the Courts have, at all times, visited them with censure, and ordered them to be corrected at the cost of the offending party. And the mode of calling the attention of the Court to such evils in practice and pleadings as these, has been, by *motion*, and not by demurrer. Therefore, the Simplifying Act has, in all cases of formal defects in the pleadings, or other malpractice, made the *motion* the proper mode of calling the attention of the Court to the matter. One of the most important Rules relative to the class of evils of which we are speaking, is contained in the fifty-seventh section of the Act of Simplification, in these words:

57. "If any pleading be so framed as to prejudice, embarrass or delay the fair trial of the action, the opposite party may move the Court to strike out or amend such pleading, and the Court shall make such order respecting the same, and also respecting the costs, as the Court shall see fit."

This Rule gives the Court the most ample power, whether it possessed the power before or not, over all tricky pleadings, and all cases of mere colorable or pretended amendments.

By the old law, if a party relies on a deed, to which he is a party, and which is in his possession, he must *make profert* of it, that is, aver that he brings the deed into Court; and

while the deed is thus in Court, if the adverse party wishes it, he might *crave oyer* of it; that is, hear it read. The Maryland practice of profert was to leave the deed, or a copy, at the Clerk's office, where the pleading, making profert, was filed. If then, the party, craving oyer, wished to use any part of the deed in his plea, he must set out the whole deed, no matter how long; and the deed then became a part of the pleading of the party making the profert. No such practice obtained in regard to writings not under seal. There is now, no matter what there may have been in earlier ages, no reason why the two kinds of writings should be placed upon a different footing. The practice of profert and oyer encumbered the pleadings with unnecessary matter, and gave them a clumsy form; though it was not usual to actually insert the deed in the pleading until a record was made out. The Act of Simplification has abolished profert and oyer, and substituted another practice, by the fifty-eighth and fifty-ninth sections, in these words:

58. "It shall not be necessary to make profert of any deed or other document mentioned or relied on in pleading; and if profert shall be made, it shall not entitle the opposite party to crave oyer of, or set out upon oyer such deed, or other document."

59. "A party pleading, in answer to any pleading in which any document is mentioned or referred to, shall be at liberty to set out the whole, or such part thereof as may be material, and the matter so set out, shall be deemed and taken to be part of the pleading in which it is set out."

The first of the sections abolishes the old practice; and the second establishes a new one. The new practice extends to all documents, whether under seal or not, and is so simple that the Rule sufficiently explains itself.

The practice of profert and oyer extended to letters testamentary and of administration, &c. The forms of making

profert and craving oyer, may be seen in Stephen or Chitty on Pleading, or in Harris' Entries.

Wherever a man does any thing by force of a warrant or authority, as a bailiff acting under a precept; or does an act where an instrument of writing is required; such precept, and such instrument of writing, were required, by the old law, to be mentioned in a pleading in regard to such acts. The sixtieth section of the Simplifying Act has introduced a different Rule in such cases, as follows:

60. "Where in a pleading, any thing is alleged generally to have been done, it shall be considered as meaning legally done, and, by the proper instrument of writing where one is required, without stating how or in what manner it was done."

In an action on a contract where the Defendant's performance is to depend on some act to be done or forborne by the Plaintiff, the Plaintiff must aver the performance or fulfilment of such condition precedent, in order to show that he has a cause of action. And where a Defendant has to do some act before the condition precedent is incumbent on the Plaintiff, in order to take advantage, as a defence for his own non-performance of the condition subsequent, of the Plaintiff's non-performance of the condition precedent, he must allege performance by himself of such act. In these cases and the like, the Plaintiff and the Defendant were required by the old law to state "a certain and exact performance." The sixty-first section of the Simplifying Act has given the following Rule for such cases:

61. "It shall be lawful for the Plaintiff or Defendant in any action, to aver performance of conditions precedent generally, and the opposite party shall not deny such averment generally, but shall specify in his pleading the condition or conditions precedent, the performance of which he intends to contest."

By this Rule the Plaintiff or Defendant may aver *that he has performed all things on his part to be performed;* and this will be sufficient to necessitate the opposite party to specify, in his next Pleading, the condition or conditions precedent which he denies the performance of. The doctrine of conditional contracts, like the doctrine of contracts generally, is a part of the law, and does not come within the scope of a treatise on Pleading or Procedure.

In order to prevent the retardation of the issue, it is manifestly necessary, that both the Plaintiff and Defendant shall be confined to the grounds they at first take in the action. While the parties are respectively confined to the grounds they first take in their Declaration and Plea, the process of pleading must exhaust, after a few alternations, all the facts involved in the cause; and thereby evolve the question in dispute. But if a new ground be taken in any part of the series, the result is necessarily postponed. And if one departure, as it is called, be allowed, why not more? The Simplifying Act has therefore preserved the Rule against departure in pleading, as it was called in the old system. It is embraced in the sixty-second section as follows:

62. "Parties shall be respectively confined to the grounds both of fact and of law which they take in the Declaration and the Plea, and shall not resort to another in any subsequent pleading."

A departure obviously cannot take place earlier than the replication; but it has most frequently occurred in the rejoinder. The Rule implies that there may be a departure either in law or fact. A departure in law, is where a party puts the same facts on a new ground in point of law; as if he relies on the effect of the Common Law, in his Declaration, and on a custom, in his Replication; or on the effect of the Common Law in his Plea, and a Statute in his

rejoinder. An example of a departure in fact, is where the Plaintiffs, as executors, declared on several promises alleged to have been *made to the testator*. The Defendant pleaded, that she did not promise within six years before the bringing of the action. The Plaintiffs replied, that within six years before the action, letters testamentary were granted to them; whereby the action accrued *to them*, within six years. In the Declaration the Plaintiffs lay the promises to the testator; and in the Replication allege the right of action to accrue *to themselves as executors*. They should have laid the promises to themselves in the Declaration as executors, if they meant to rely upon that ground. (Steph. Plead. pp. 405–11.)

It is not necessary, in pleading, for a party to state matter which would come more properly from the other side. This principle the Act of Simplification has set forth in the sixty-third section in these words:

63. "A pleading should not anticipate the answer of the opposite party. It is sufficient that each pleading contain facts which constitute a good *prima facie* claim or defence or reply, without reference to possible objections not yet urged. But where the matter is such, that its affirmation or denial is essential to the apparent or *prima facie* right of the party pleading, there it ought to be affirmed or denied in the first instance, though it may be such as would otherwise properly form the subject of objection on the other side."

This rule divides itself into two parts. The first part is exemplified thus: In a declaration of debt on a bond, it is unnecessary to allege that the Defendant was of full age when he executed it; for though a person under age can not execute a bond, yet it is for the other party to show this by the plea of infancy, and it need not be denied by anticipation. So, where there was a covenant in a charter-

party, "that no claim should be admitted or allowance made for short tonnage, unless such short tonnage were found and made to appear on the ship's arrival, on a survey to be taken by four shipwrights, to be indifferently chosen by both parties," and in an action of covenant brought to recover for short tonnage, the plaintiff had a verdict. The Defendant moved in arrest of judgment, that it had not been averred in the Declaration, that a survey was taken, and short tonnage made to appear. But the Court held, that if such tonnage had *not* been taken, this was matter of defence, which ought to have been shown by the Defendants; and refused to arrest the judgment. (1 T. R. 638.)

The second half of the rule, which is a qualification of the first half, is exemplified by the following case: In an action brought by a commoner against a stranger, for putting his cattle on the common, *because he could not enjoy the common in so ample a manner as he ought*, the Defendant pleaded a license from the lord, to put his cattle there, but did not aver that there was sufficient common left for the commoners. This was held, on Demurrer, to be no good plea; for though it may be objected, that the Plaintiff may reply that there was not enough common left, yet, as he had already alleged in his Declaration, that his enjoyment of the common was obstructed, the contrary of this ought to have been alleged in the plea. (2 Mod. 6. See Steph. Plead. pp. 354–7.)

As the great purpose of simplification was to abolish all useless forms, and to so frame the machinery of pleading as to make substance, or the merits of the case, the sole matter of dispute in litigation, the Act of Simplification, besides provisions which expressly abolish useless forms specifically mentioned, has a general provision, which, out of abundant caution, declares that form shall in no instance control substance. This rule is contained in the sixty-fourth section in these words:

64. "The Form of a Pleading shall in no case whatever control its substance. Matter, though alleged in the form of inducement, if it be of the substance of the cause, may be pleaded to. And so, in all like instances."

It is hard to anticipate, by example, the possible application of this rule; for the rule itself contains the only example that I can think of, that of inducement. *Inducement* is the technical name for introductory or explanatory matter, and was, in the old pleading, stated in the form of introductory allegation. And the rule, above, means that if matter of substance should be stated, as though it was merely introductory, it shall not thereby lose its substantial import. The rule as embodied in the case of inducement, was the rule of the old pleading. (Steph. Plead. 258.)

It was a rule under the old system of pleading, that *a party might traverse a material allegation of title or estate to the extent to which it was alleged, though it need not have been alleged to that extent, and that the title or estate must be proved to the extent alleged.* In an action of replevin, for example, the defendant avowed the taking of the cattle, as damage feasant, in the place in which, &c.; the same being the freehold of Sir F. L. To this the Plaintiff pleaded, that he *was seised in his demesne, as of fee*, of B. close, adjoining to the place in which, &c.; that Sir F. L. was bound to repair the fence between B. close, and the place in which, &c.; and that the cattle escaped, through a defect of that fence. The defendant traversed, that the Plaintiff *was seised in his demesne as of fee*, of B. close; and on demurrer, the Court was of opinion, that it was a good traverse; for though a less estate than a seisin in fee would have been sufficient to sustain the Plaintiff's case, yet as the Plaintiff who should best know what estate he had, had pleaded a seisin in fee, his adversary was entitled to traverse the title so laid. So in an action for trespasses committed in a close of pasture, containing eight acres, in the town of Tolland Royal, the Defend-

ant pleaded, that W. Earl of Salisbury, was seised in fee, and of right, of an ancient chase of deer, called Cranborn, and that the said chase did extend itself, as well in and through the said eight acres of pasture, as in and through the said town of Tolland Royal: and justified the trespasses, as committed in using the said chase. The Plaintiff traversed, *that the said chase extended itself as well to the eight acres, as to the whole town;* and issue being joined on this plea, it was found for the plaintiff. It was objected, that the issue and verdict were faulty, and ought not to preclude the Defendant; because if the chase extended *to the eight acres* only it was enough for the Defendant; and therefore that the fact that it did not extend as well to the whole town as to the eight acres did not conclude against the Defendant's right in the eight acres which was only in question. But as the Defendant had put more in his plea than was needed, it was his fault, and must prove it as alleged. In order to obviate the evil of such cases as these, where upon the face of the pleadings and the proofs at the trial, it was manifest that the losing party had a just case, the Simplifying Act, in the sixty-fifth section, gives this rule:

65. "If the Plaintiff allege a greater title or estate than is necessary to sustain his cause of action, and it be traversed to the full extent, he shall not be compelled to prove more than is necessary to sustain his action. And if a Defendant puts into his plea more than is needed for his defence, he shall not be compelled to prove more than is needed for his defence."

The next rule in the Act of Simplification is contained in the sixty-sixth section, in these words:

66. "When a pleading can be taken two ways, it shall be taken in that which is most against the party pleading it."

This is a mere precautionary rule, that will hardly ever

be applicable to a pleading under the simplified system. Its import is so obvious as to need no comment.

As every pleading ought to be authenticated as the act of the party pleading, the Act of Simplification, by the sixty-seventh section, makes it necessary that the party, or his Attorney, shall sign it. This is the best possible mode of authenticating the pleading. Without such signature, therefore, there can be no pleading. Any writing, though purporting to be a pleading, would be a nullity without such signature. The section of the Act is in these words:

67. "Every pleading shall be in writing, and signed either by the party or his Attorney."

The sixty-eighth section of the Act of Simplification requires every pleading to have, at the commencement, a superscription of the Court in which it is filed. It may be in this form: "In the Circuit Court for —— County;" or as the case may be. If, however, the title of the Court be omitted, the pleading would not thereby be a nullity. The Court could direct the clerk to superscribe the title of the Court; it being a mere formal defect, and not demurrable. The section is in these words:

68. "Every Declaration and other Pleading shall be entitled of the proper Court."

As it would have led to prolixity, to have specified in every rule every pleading to which it was intended to apply, and as the omission of any one would have been a defect, the Act of Simplification has obviated the evil, by a rule contained in the sixty-ninth section, in these words:

69. "Whenever any rule of pleading, contained in this code, shall specify in terms only one or more species, as Declaration, Plea, or any other, yet if in its nature and scope

the rule be applicable to other pleadings also, it shall be taken to apply to all to which it is applicable."

I have now concluded the examination of the rules which apply to all pleadings. I will next consider the rules which apply to the Declaration.

OF THE DECLARATION.

The Declaration is the first step in pleading, and the chronological order would have required me to consider it first. But it was found important to postpone its consideration until this stage of our exposition; and to place its special rules after those which apply to all pleadings, in order to prevent repetition. These considerations determined the same order in the Simplifying Act, which I follow throughout in this treatise.

The rules which we have just considered bear so fully upon the declaration, that there are but few rules which relate to it exclusively. The statements of causes of action necessarily vary according to the facts of each case. I have already, in considering the fifty-second section of the Act of Simplification, pointed out what is the proper material for framing a declaration, as well as other pleadings. The rules which I am now about to consider can have no application to any pleading but the declaration.

The pleader is, of course, assumed to be familiar with causes of action, or, in other words, with claims that can be sustained by an action at law. For pleading does not teach the doctrine of rights, or even of remedies; but only the mode of stating claims or injuries, according to forensic usage, for their consideration and determination by the Court and the jury. The doctrines of rights and injuries are, of course, not affected by the Act of Simplification: but that of remedies is greatly simplified, as I have shown in the first chapter of this treatise. And it has been through the

Simplification of Remedies that the Simplification of Pleading has been effected. Under the old system, the statement of a cause of action had to be varied, not only according to the circumstances of each case, but according to the form of action, whether in Assumpsit, Debt, Covenant, Detinue, Case, Trover, Replevin, or Trespass, which involved the nature and special applicability of all those remedies or forms of actions. But now, remedies are narrowed down to Summons, Replevin and Ejectment; and even in these, substance is everything and form nothing; so that, in pleading now, the cause of action alone is to be considered, in framing the statement of the declaration.

The first rule relative to the declaration is contained in the seventieth section of the Act of Simplification, in these words:

70. "A Plaintiff shall recover only in respect of the ground of action stated in his declaration, and not in respect of another disclosed by the Defendant's plea."

This has always been the law; at all events, ever since pleading became systematic. This rule may perhaps seem to conflict with the forty-second section of the Act of Simplification, relative to the effect of pleading over without demurring. But it does not. That section applies merely to the curing of a defect in the declaration, by the Defendant's plea; whereas this applies where the Plaintiff has wholly failed in stating his cause of action, but one is disclosed by the Defendant's plea, as has sometimes happened in the experience of Courts. The rule, too, may seem to be little more than the repetition of the sixty-second section of the Act of Simplification, as far as that rule bears on the declaration. But it will be remembered, that that section prevents the Plaintiff from shifting his cause of action from one of his own pleadings to another—from the declaration to the replication—that is, taking a different ground in the latter from that taken in the first; whereas, this rule pre-

vents him from shifting his ground of action from his own pleading to that of the Defendant.

I have all along kept it prominently in view, that the great purpose of the simplified pleadings is to make the parties disclose their respective cases as soon as possible. In furtherance of this purpose, and to make the Plaintiff disclose the real character of his case at once, so that an issue can be speedily formed upon the merits, the seventy-first section of the Act of Simplification prescribes the following rule:

71. "Whenever a Plaintiff claims a right derogatory from the general law, or when his claim is founded upon an exception of any kind, he shall set forth such claim or such exception particularly in his declaration."

Cases, to which this rule points, do not often occur: but when they have occurred, they have been attended with embarrassment, from the Plaintiff's stating his case in a general way, instead of specifying it as an exception. For example: The Plaintiff brought an action of trespass for fishing in his fishery. The Defendant pleaded that the place is an arm of the sea, in which every subject has a right to fish. The Plaintiff in his replication, for the first time, disclosed his claim as an exclusive prescriptive right. The rule under consideration is designed to compel a Plaintiff, in such a case, and all like it, to disclose the precise cause of action, as being exceptional, in his declaration, and not delay to do so till the replication.

Where the cause of action, is founded on a contract of any kind whatever, it must consist in a breach of that contract. Therefore, in all actions on bonds with conditions, the breach of the condition must be stated in the pleadings. The usual practice, under the old system of pleading, was to declare on the bond as though it were single, that is, without conditions; and for the Defendant to plead general

performance; and then for the Plaintiff in his replication to assign the breaches of the conditions, or, in other words, to state his real cause of action. By this mode of pleading the declaration was useless, and the replication took its place. In order to prevent this prolonged and vexatious pleading, the seventy-second section of the Simplifying Act establishes the following rule:

72. "In all actions on bonds with conditions, the Plaintiff shall in the declaration notice the conditions, and allege the breach or breaches relied on."

As this rule merely shifts the statement of the breaches from the replication to the declaration, the mode of stating the breaches remains as under the old system, except as far as the form of these statements may be affected by the different sections of the Act of Simplification abolishing the formal parts of declarations in all cases. Therefore, as the statement of breaches is a difficult part of pleading, I propose to state the general doctrine upon the subject, while, at the same time, I will illustrate the rule under consideration.

No one possible form of statement will suit every breach; for each breach must depend on the particular stipulation broken, and these are as various as the transactions embraced in the agreements amongst men. Breaches must therefore be stated according to the special facts of each case which constitute the violation of that special contract. And as there are many different forms of contract, so there must be many different forms of breaches. In order therefore to explain the different forms of breaches, it becomes necessary to advert to the different forms of contracts. The forms of contract, of which I now speak, are not those technical forms—*of contracts under seal, and contracts not under seal.* But the forms of which I now speak constitute the substance of the contracts, making them differ from each other as the different wants and wishes of the contracting

parties differ from each other. Sometimes the contract is simply a promise, upon a consideration already enjoyed by the person promising, to pay to the person from whom the consideration passed, a certain sum of money. Or the contract may consist of stipulations dependent on each other; where the obligation to perform the one may depend on the prior performance of the other. Or, the contract may consist of mutual stipulations to be performed at the same time. Now, it is manifest, that statements of the breaches of these different contracts must, of necessity, differ in form as well as substance, from each other. In the first example, the breach would be sufficiently stated, by simply averring, *that the money promised to be paid, had not been paid.* But in the second example, as the obligation to perform the thing stipulated, depends on the prior performance of something on the part of the Plaintiff, he must *aver his prior performance and then allege the non-performance by the Defendant*, to show a breach. And in the third example, the party suing must allege *that he was ready and willing to perform his part, and that the Defendant neglected or refused to perform his part.*

The pleader therefore, before assigning the breaches, must understand the nature of the contract, and determine what facts are necessary to constitute a breach of it on the part of the Defendant. The class of contracts which oppose the greatest difficulty are those like the second example given above, called Dependent Covenants. Whether the Covenants are dependent or independent, is to be collected from the evident sense and meaning of the parties; and however transposed the covenants may be in the deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance. And there are no precise technical words to make a Stipulation a condition precedent or subsequent: but in all cases the real import of the words must alone be considered in the special case.

In point of form, an averment of a breach may be in any words amounting to an express allegation. The statement

must be positive, and not by way of recital, or inference. The breach should be assigned in the words of the contract either negatively or affirmatively as the case may require, or in words that are co-extensive with the import and effect of the contract. And if the contract be in the *disjunctive*, the breach ought to be assigned, that the Defendant did not do either act; as on a promise to deliver a horse by a particular day, or pay a sum of money. And no inconvenience can result from laying the breach as extensively as the contract; for the Plaintiff can recover, though he only prove part of the breach laid. What the degree of particularity must be in each case can be determined by no rule. Less particularity is, however, required where the breach lies more in the Defendant's than the Plaintiff's knowledge.

At the Common Law, in an action on a bond with a condition for the performance of any thing, the Plaintiff could assign only one breach of the condition; because the bond was forfeited by the breach of one covenant as much as of several covenants; and the assignment of more than one breach would make the declaration bad for duplicity.* The Plaintiff therefore, because of one breach, had judgment to recover the penalty of the bond together with his costs; and was entitled to take out execution for the whole without any regard to the damage which he had actually sustained by the breach of covenant. The Defendant was therefore constrained to go into equity to obtain relief against an unconscientious demand of the whole penalty in cases where small damages only had accrued. In order therefore to protect Defendants against such unconscientious judgments, the Statute 8 & 9 W. 3, c. 11, s. 8, enacted that—"In all actions in any court of record upon any bond, or on any penal sum, for non-performance of any covenants or agreements contained in any indenture, deed or writing, the Plaintiff may assign as many breaches as he shall think fit," &c. This statute gives Plaintiffs relief up to the extent of the damages

* Duplicity will be considered hereafter.

sustained, and protects Defendants against the payment of further sums than are in conscience due. The Plaintiff must therefore (the word *may* in the statute is interpreted *must* by the Courts,) assign all the breaches of the bond on which he means to rely; and if the Defendant plead to issue, the jury upon the trial must assess damages for such of the breaches assigned as the Plaintiff shall prove to have been broken. Bonds may be conditioned either for the performance of certain matters set forth in the condition, or of the covenants or other matters contained in an indenture or other instrument, collateral to the bond, and not set forth in the condition. The mode of pleading is the same in both cases; and the rule under consideration is applicable to both.

Injuries that are not breaches of contract constitute another great class of causes of action. They are injuries to the person; or to character; or to property. They are called *wrongs.*

Injuries to the person are so simple in their nature, and are so easily stated in the declaration, that I shall give no special direction in regard to them: but merely refer the student, to the Forms for such declarations in the third chapter of this treatise.

The declaration, in cases of injury to character, was so artificial under the old system of pleading, that the Act of Simplification has established the following rule, in the seventy-third section:

73. "In all actions of Libel or Slander, the Plaintiff shall be at liberty to aver that the words or matter complained of were used in a defamatory sense, specifying such defamatory sense, without any prefatory averment, to show how such words or matter were used in that sense, and such averment shall be put in issue by the denial of the alleged Libel or Slander; and when the words, or matter set forth, with or without the alleged meaning, show a cause of action, the Declaration shall be sufficient."

Where the words used are not actionable in themselves but derive their slanderous or libellous meaning from extrinsic facts, it was necessary, under the old system of pleading, to state these extrinsic facts in an introductory part of the declaration. The mode of doing this was, first, to state the facts in reference to which the words were spoken or written; secondly, to show that the words were published of and concerning such facts; thirdly, to connect the words with such previous facts. This was effected by technical forms, called *colloquiums* and *innuendoes*. The section, of the Act under consideration, makes it sufficient to state in what defamatory sense the words were used; and, if it be proved to the satisfaction of the jury that the words were used in that particular defamatory sense, the plaintiff shall have verdict, and judgment. The student is referred to the 49 page of Stephen on Pleading for an old form of declaration in Libel, which will exemplify to him, when contrasted with the simplified form in our third chapter, the burdensome technicalities of the old form.

The mode of stating injuries to property will be considered hereafter, under the sections of the Act of Simplification specially applicable to such injuries.

OF COMMENCEMENTS AND CONCLUSIONS OF DECLARATIONS.

It was a rule, under the old practice, that every pleading must have its proper comment and conclusion. The Declaration commenced with a *venue*, that is, the name of a County and the words, "to wit." The object of the venue was originally, that the cause might be referred, in Courts whose jurisdiction extended over several Counties, to the jury of the proper County. It has no such use now in Maryland. After the venue followed a recital of the original writ. If the Plaintiff was a man, he was called a yeoman, and if a single woman, she was called a spinster or widow. And if

the action was trespass, the words, "with force and arms," and "against the peace, government and dignity of the State of Maryland" were recited. And in all actions, there were equally artificial commencements to the declarations.

The conclusions, too, to declarations were very artificial. The student can see the old forms of Commencements and Conclusions to declarations in the 1 Vol. Evans Harris' Entries.

The seventy-fourth section of the Act of Simplification has established a very simple form of Commencement and Conclusion for declarations. The section is as follows:

"74. Every Declaration shall commence as follows, or to the like effect:

"—— County (*or City*) A. B. by S. T. his Attorney (*or in Person as the case may be,*) sues C. D. for, (*here insert the cause of action:*);"

And shall conclude as follows, or to the like effect:

"And the Plaintiff claims $—— " (or *if the action is brought to recover specific goods,*) "the Plaintiff claims a return of said goods or their value, and $—— for their detention."

Under the old system of pleading, the declaration in all personal actions, alleged a *damage* of the Plaintiff, and specified the amount of the damage. If the action was brought for the specific recovery of a liquidated or certain sum of money or of a chattel, damages were claimed only for the *detention* of such debt or chattel; and the damages, not being the main object of the action, were laid in a small sum. But where the damages, as was the case in all personal actions besides those just mentioned, were the main object of the action, they were laid high enough to cover the whole demand.

As, by the Act of Simplification, the formal distinction between *debt* and *damages*, in all actions where the Plaintiff recovers a sum of money, has been, as we shall see, abolished, and the judgment is rendered without any such distinction,

the conclusion of the declaration is the same in all cases where the Plaintiff seeks to recover money whether liquidated or unliquidated. The Plaintiff, in the conclusion of his declaration in such cases, claims a certain sum in dollars, large enough to cover his whole demand or demands. As it would be impossible in many cases, especially where several causes of action are joined in the suit, for the plaintiff to foreknow what amount would be allowed to him, it would be necessary in such cases to claim a sum different from the one that might be recovered; and as the Plaintiff cannot recover more than he claims, it is best, in all cases for the recovery of money, to claim a round sum in dollars, large enough to cover the real demand or demands, and take judgment for the real amount allowed.

In replevin for the specific recovery of a chattel, the *damage* being only for the *detention* of the chattel, and not for its value, will, of course, be graduated in amount accordingly.

Any causes of action, numbered as hereinafter required, stated between the commencement and conclusion given above, will be a good declaration under the Act of Simplification. And the mere numbering of the separate causes of action designates each as a different count, without any of the formal statement, required by the old system of its being a separate count, and without the corresponding commencement and conclusion.

OF PLEADINGS SUBSEQUENT TO THE DECLARATION.

We now enter upon the consideration of the rules exclusively for framing the Pleadings which occur after the Declaration. These Pleadings are: 1. The Plea, which is the Defendant's answer to the Declaration; 2. The Replication, which is the Plaintiff's answer to the Plea; 3. The Rejoinder, which is the Defendant's answer to the Replica-

tion; 4. The Surrejoinder, which is the Plaintiff's answer to the Rejoinder; 5. The Rebutter, which is the Defendant's answer to the Surrejoinder: 6. The Surrebutter, which is the Plaintiff's answer to the Rebutter. There is no name for any further pleading; and it seldom occurs, that the pleadings extend beyond the rejoinder; as the rejoinder must support and not depart from the plea. (1st Chit. Plea. 563.) The demurrer can, of course, be used instead of either of these pleadings.

The plea is, by far, the most important of the pleadings which occur after the declaration; and many of the rules which we are about to consider, as will be seen, apply exclusively to it. Pleas, which go to the merits of the case, and deny that the Plaintiff ever had any cause of action; or admitting that he had, insist that it is determined by some subsequent matter, are called *pleas in bar*. And it is to this class of pleas, that the rules about to be considered apply. It is entirely out of the scope of pleading to state the various defences in actions. These the Student must learn from the general law. The office of pleading is merely *to define their scopes and to show the mode of stating them.* The defences, however, which most usually occur in practice, will be given in the *Forms* in the third chapter of this treatise.

The first of the rules under this head, is embraced in the seventy-fifth section of the Simplifying Act, in these words:

75. "Every pleading must be an answer to the whole of what is adversely alleged; but where there are several allegations, each of which is essential to the support of the Pleading, the opposite party may traverse one or more of them, as he pleases."

This rule defines the scope of every pleading subsequent to the declaration. Each must be an answer to the whole of what is alleged in the pleading which it answers. Or, what is the same thing, it must answer some allegation that

is essential to the adverse pleading. In either case, the adverse pleading will be overthrown, if the subsequent pleading be sustained.

And the seventy-sixth section of the Simplifying Act gives a rule that is a consequent of this one. It is as follows:

76. "Whenever a plea does not answer the whole declaration, whether it professes to do so or not, the Plaintiff may have judgment, as by *nil dicit*, against the Defendant, in respect of what is not answered."

For example: in an action for breaking a close, and cutting down three hundred trees, if the Defendant pleads, as to cutting down all but two hundred trees, some matter of justification or title, and as to the two hundred trees says nothing, the Plaintiff is entitled to sign judgment as by *nil dicit*, against him, in respect of the two hundred trees, and to demur or reply to the plea as to the remainder of the trespass. Under the old pleading there was a distinction in a case like this, where the Defendant's plea *professed* to answer, and where it did not profess to answer the whole trespass. In the first case, the plea was considered insufficient, and the Plaintiff could not sign judgment for the part not answered, but must demur to the plea for insufficiency, else, as we shall presently see, the action would be discontinued. The simplified rule abolishes this distinction; and in either case, a judgment, as by *nil dicit*, can be entered for the unanswered part.

Another rule, kindred to the two just considered, is contained in the seventy-seventh section of the Act of Simplification, in these words:

77. "Every pleading shall be considered as confessing such traversable matters alleged on the other side, as it does not traverse; but facts not traversed shall not be taken as

admitted for any other action between the same parties, if the present issue be found for the person traversing."

If a party did not wish facts which he does not traverse, to be taken as admitted by him, in another suit that might grow out of the same transaction under the old Pleading, he *protested* as it was called, as to such facts—which was a *sham* denial made merely to save him from the implied confession of the facts not traversed, if another suit should be instituted, in case the present one should go in his favor. The rule under consideration does away with the necessity of *the protestation;* as, by it, the facts not traversed shall not be considered as admitted for another suit, if the issue in the present one be found for the party traversing. The Student curious to see the Form of the Protestation, will find it in Steph. Plead. 236.

As we have already seen, the Court, on demurrer, will consider the whole series of pleadings and give judgment for the party who, on the whole, appears to be entitled to it. Thus, on demurrer to the replication, if the Court think the replication bad, but perceive a substantial fault in the *plea*, they will give judgment, not for the Defendant, but the Plaintiff, provided the *declaration* be good; but if the *declaration* also be bad in substance, then, upon the same principle, judgment would be given for the Defendant. (Steph. Plead. 162.) From this, it is seen, that a pleading does not admit the sufficiency in law of the facts which it answers. This rule is contained in the seventy-eighth section of the Simplifying Act, in these words:

78. "A pleading shall not be considered as admitting the sufficiency in law of the facts adversely alleged."

We have seen, by the fifty-second section of the Simplifying Act, that matter of law must not be stated in a pleading. If though such matter should be stated, it cannot be tra-

versed. Questions of law are raised only by demurrer; therefore, the party wishing to deny a legal inference, which may chance to be stated in a pleading, must do it by demurrer. For example: to an action for fishing in the Plaintiff's fishery, the Defendant pleaded, that the *locus in quo* was an arm of the sea, in which every subject of the realm had liberty and privilege of free fishing; and the Plaintiff, in his replication, traversed that in the said arm of the sea every subject of the realm had the liberty and privilege of free fishing. This was held to be a traverse of a mere inference of *law*, and therefore bad. But where an allegation is mixed of law and fact, it may be traversed. Thus, in answer to an allegation that a man was taken out of prison by virtue of a certain writ of habeas corpus, it may be traversed, that he was taken out of prison by virtue of the writ. (Steph. Plead. pp. 215–16.) This matter is regulated by the seventy-ninth section of the Simplifying Act as follows:

79. "A traverse must not be taken upon matter of law: but where a mere legal inference is stated in a pleading, and the opposite party wishes to deny it, his course shall be to demur. But where an allegation is mixed of law and fact, it may be traversed."

It is not necessary to state in a pleading, matter that is implied in it. For example: If a man pleads that he is heir to A., he need not say that A. is dead; for it is implied, as no one can be the heir of a living man. But the opposite party may, instead of denying that he is heir to A., plead specially, that A. is not dead. This is authorized by the eightieth section of the Act of Simplification.

80. "A traverse must not be taken upon matter not alleged; but it may be taken upon matter, which, though not expressly alleged, is necessarily implied."

Where a Plaintiff is, by law, entitled to recover *in pro portion* to the loss or injury he has actually sustained, or the service he has rendered, it follows that a traverse which ties him up to prove the *whole* damage or claim stated in his declaration, ought not to be allowed. Thus, on a policy of insurance, the Plaintiff averred, that the ship insured did not arrive in safety; but that the said ship, tackle, apparel, ordnance, munition, artillery, boat, and other furniture were sunk and destroyed in the said voyage. The Defendant, instead of denying *disjunctively*, that the ship *or* tackle, &c., was sunk or destroyed, denied *conjunctively* that the ship, tackle, apparel, ordnance, munition, artillery-boat, and other furniture, were sunk and destroyed in the voyage. As the Plaintiff would be entitled to recover compensation *for any part* of that which was the subject of insurance, and had been lost, the Defendant, obviously, ought not to be permitted so to plead, that if issue be joined on his Plea, and he should prove that only a cable or anchor arrived in safety, he would be acquitted of the whole loss, as a traverse in the conjunctive form would authorize. Therefore, upon demurrer, the traverse was adjudged bad. (2 Saund. 206.) So in an action for compensation for the Plaintiff's service, as a hired servant, the Plaintiff alleged that he served from the 21st March, 1647, to 1st November, 1664. The Defendant denied, that the Plaintiff served until the 1st of November, 1664. This traverse ties up the Plaintiff, to prove that he served the whole time alleged; whereas he is entitled to compensation *pro tanto*, for any period of service. The traverse is therefore bad. (1 Saund. 267–8, n. (1).) The principle of these cases is contained in the eighty-first section of the Simplifying Act, in these words:

81. "Where a part of the facts stated constitute a cause of action or a defence, the part must be denied as well as the whole; and if the part be proved it will be sufficient. And where a sum of money is alleged to be due, the denial must be, that no part of it is due; and a general denial, or a

denial that the whole sum is not due, shall be taken to mean that no part of the sum is due."

The eighty-second section of the Simplifying Act, contains a rule of kindred import with the one just considered. Its design, like the one just considered, is to remedy the evil of pleading too broadly, and thereby letting the real issue slip through the alternate pleadings. It compels a party, who is to answer a pleading, which is too broad to plead in such a way as to narrow the pleading of his adversary, by denying it in a way that will enable the adversary to sustain himself, if he really have a cause of action or a defence, but less general than the one stated. This evil is not likely to occur in practice, with the Rules for specific statement prescribed by the Simplifying Act. This section, like some others, is therefore, inserted out of abundant caution. It is in these words:

82. "Where an allegation, less general than the one set forth in a pleading, would constitute a cause of action, or a defence, or a reply, the Defendant or Plaintiff shall not deny it generally, but shall so plead as to deny any cause of action or defence in the case."

The next section of the Act grows out of the same difficulty with the preceding section. It enacts, that where the Plaintiff tenders such a traverse to the Defendant's plea, as to enable himself to recover without proving any right in himself, the pleading shall be amended. It will, perhaps, be a little startling to even the most experienced lawyer, that the exigencies of judicial investigation should be thought to require such a Rule. But there have been cases, where judgment has been given for a Plaintiff, though he had proved no right in himself; owing to the issue formed by the pleadings being too broad; as for instance: In an action for fishing in the Plaintiff's fishery, the Defendant pleads that *all* persons have the right to fish in it,

and the Plaintiff replies that *all* persons have not the right. Upon such an issue the Plaintiff would have judgment by showing that it was the separate right of any person; and his own right might not come into controversy at all. Just such a case as this, was argued several times in the Exchequer Chamber in England, before the Court could bring themselves to reverse the judgment. Though the Court did at last say in their judgment, that "from the moment it appeared that upon the pleadings the Plaintiff might have recovered a verdict in an action of trespass, without having either possession or right, it seemed very difficult to support the judgment." The section is as follows:

83. "Whenever the traverse tendered by a Plaintiff to the Defendant's plea is such as will enable the Plaintiff to recover, without proving his right, it shall, upon motion, be amended by the Court."

We have seen, that by the seventy-fifth section of the Simplifying Act, every pleading must be an answer to the whole of what is adversely alleged. This was the rule under the old system of pleading; and if the Defendant's plea did not answer the whole Declaration, and the Plaintiff failed to take judgment for the part not answered, but only demurred or replied to the plea, there was thereby produced an interruption or chasm in the pleading, called, in technical phrase, a *discontinuance*. The eighty-fourth section of the Act of Simplification is designed to prevent a discontinuance in such cases. It is as follows:

84. "Whenever a plea does not answer the whole declaration, and the Plaintiff demurs to it, without entering judgment for that part of his declaration which is not answered by the plea, the action shall not be discontinued, but the demurrer shall apply to the plea, in the same manner, as if judgment had been entered for the part of the declaration not answered."

The seventy-sixth section of the Simplifying Act is co-operative with the eighty-fourth section, as has been seen, in remedying the evil when a plea does not answer the whole declaration. The two sections must, therefore, be considered together.

The next section of the Act of Simplification is in these words:

85. "It shall not be allowable, both to plead and demur to the same matter; but if the demurrer be overruled, then the party shall be allowed to withdraw the demurrer and to plead."

This rule, it will be observed, only prohibits the pleading and demurring to the *same matter*. It does not forbid this course in regard to *distinct statements*. A man may plead to one count, or one plea, and demur to another. (Step. Plead. 296.)

We have, heretofore, shown that the demurrer is the pleading, by which questions of law are raised. But it must be observed, that the whole proceeding of trial by jury, takes place under the superintendence of a Judge, who decides all points as to the admissibility of evidence, and directs the jury on all such points of law arising on the evidence, as are necessary for their guidance in appreciating its legal effect, and drawing the proper conclusion in their verdict. These questions of law that spring out of the application of the evidence to the pleadings, are raised, by either party, by a prayer, as it is called, to the Court for its instruction on the questions to the jury; and the jury are, in civil cases, bound by the instruction of the Court on all such questions of law, just as the decision of the Court, in questions of law raised by demurrer, must be considered the law of the case. This principle is embodied in the eighty-sixth section of the Simplifying Act, as follows:

86. "All questions of law, unless raised by demurrer, shall fall under the decision of the Jury in the issue in fact, subject to the direction of the Court, upon a prayer for that purpose."

The eighty-seventh section of the Simplifying Act provides for the case where a pleading amounts to neither a traverse nor a confession and avoidance. It is in these words:

87. "When a party pleads, it must be either by way of traverse, or of confession and avoidance; and if the pleading amounts to neither of these modes of answer, it shall, upon motion be set aside."

In pleading it may sometimes happen, that the pleadings of both parties will be affirmative in the *form of words*, and yet are sufficiently affirmative and negative *in effect* to form a good issue. Thus if the Defendant plead that he was born in France, and the Plaintiff that he was born in Maryland, an issue will be formed. But the two affirmatives may not impliedly negative each other; and the simplifying Act has provided a rule for such a case as follows:

88. "Whenever in pleading, there shall be two affirmatives which do not impliedly negative each other, the next pleading to be pleaded shall deny the last affirmative; and the other shall go for nothing."

This rule can hardly ever be needed in practice; it being precautionary against a possible evil only.

It certainly comports with every notion of justice that the parties to an action should be at liberty, to place before the tribunal which is to decide upon their disputes, all the grounds upon which they can fairly rest their claim or defence. But then it is clear to all who have experience in

judicial investigations, that some limit should be put to the liberty of pleading or replying several matters whether of fact or law. To devise a rule, which will afford sufficient liberty to the parties of presenting all the grounds of their claim or defence, without allowing them a license which they can abuse, is no easy matter. The Act of Simplification gives the fullest liberty to both Plaintiff and Defendant, subject to the discretionary control of the Court. The discretionary control of the Court is better than any fixed rule of limit; because such a rule must in some cases operate unjustly, as it cannot anticipate and provide for every contingency; whereas a wise discretion can provide for it when it does arise. But to prevent the discretion of the Court from being exercised arbitrarily, it is limited by the affidavit of the parties. And the parties too are checked by their oaths, and by costs. The section of the Act is in these words:

89. "The Plaintiff in any action may plead, in answer to the plea or any subsequent pleading of the Defendant, as many several matters as he shall think necessary to sustain his action: and the Defendant in any action may plead, in answer to the Declaration, or other subsequent pleading of the Plaintiff, as many several matters as he shall think necessary for his defence; provided, that the party so pleading or his Attorney makes affidavit, if required by the Court, to the effect, that he is advised and believes that he has just ground to traverse the several matters proposed to be traversed by him, and that the several matters sought to be pleaded as aforesaid, by way of confession and avoidance, are respectively true in substance and in fact. And the costs of any issue, either of fact or law, shall follow the finding or judgment upon such issue, and be adjudged to the successful party, whatever may be the result of the other issue or issues."

At the common law a Defendant could plead only one defence to the Plaintiff's claim, no matter how many valid

defences he had. But as the rule was found by experience, to operate injustice, the Statute of 4 & 5 Anne, ch. 16, sec. 4, gave the Defendant the liberty to plead several pleas to the same claim or complaint, "with leave of the Court." The Simplifying Act has extended the principle of the Statute of Anne beyond the plea, to which that statute confined it, to all the subsequent pleadings.

Under the old system, pleadings subsequent to the Declaration were required to have their proper formal commencements and conclusions. These defined the character of the pleadings: showing whether they were intended as being in abatement, or in bar, &c. Accordingly, if a plea commenced and concluded, as in bar, but contained matter sufficient only to abate the writ, it was a bad plea in bar, and no plea in abatement. And if a plea commenced and concluded, as in abatement, and showed matter in bar, it was a plea in abatement, and not in bar. And as the conclusion of all pleadings, which did not *tender issue* as it was called, prayed the judgment of the Court, it was in such cases called, the *prayer of judgment.* The commencement to a plea in bar was called *Actionem non;* to a plea in bar founded on matter arising after the commencement of the action, was called *Actionem ulterius non;* to a plea in bar, to an action of debt on bond, showing that the Plaintiff *never had any right of action*, as that the bond was void for illegality, was called *Onerari non;* and to a replication to a plea in bar, was *Precludi non.* The Simplifying Act has by the ninetieth section abolished all these and the like formula, as follows:

90. "In a Plea or subsequent pleading it shall not be necessary to use any allegation of *Actionem non*, or *Actionem ulterius non*, or *Onerari non,* or to the like effect, or any Prayer or Judgment, nor shall it be necessary in any Replication or subsequent Pleading, to use any allegation of *Precludi non* or to the like effect, or any Prayer of Judgment."

The old system also required Pleas to be pleaded with *defence*, which was a certain form of words, by which the plea was introduced; the form varying in some degree according to the nature of the action. In trespass it was as follows: "And the said Defendant by T. T. his attorney, comes and defends the force and injury when," &c. In all other personal actions: "And the said Defendant by T. T. his attorney, comes and defends the wrong and injury when," &c. The ninety-first section of the Act of Simplification abolishes this formal defence and introduces a very simple commencement, and requires no conclusion, for Pleas. It is as follows:

91. "No formal defence shall be required in a Plea, or Avowry, or Cognizance, and it shall commence as follows, or to the like effect:

"The Defendant by ——— his Attorney, (*or in person, as the case may be*) says that (*here state First Defence*)"

And it shall not be necessary to state in a second or other Plea, or Avowry, or Cognizance, that it is pleaded by leave of the Court, or according to the form of the Statute, or of the Act of Assembly, or to that effect; but every such Plea, Avowry, or Cognizance shall be written in a separate paragraph, and numbered, and shall commence as follows, or to the like effect:

"And for a Second (&c.) Plea the Defendant says that (*here state Second (&c.) Defence:*)" or if pleaded to part only, then as follows, or to the like effect:

"And for a Second (&c.) Plea to (*stating to what it is pleaded*) the Defendant says that," &c.,

and no formal Conclusion shall be necessary to any Plea, Avowry, Cognizance, or other subsequent Pleading."

It is seen that the terms, *Avowry* and *Cognizance* are used in the above section. They are pleadings peculiar to the action of Replevin. If the Defendant pleads some matter

confessing the detaining of the property, but showing lawful title or excuse, such pleading is not (as it would be in other actions) called a *plea in bar,* but an *avowry* or *cognizance;* the former term, applying to the case where the Defendant sets up right or title in himself: the latter, where he alleges right or title to be in another person by whose command he acted. The answer to the avowry or cognizance is called a *plea*, then follows the *replication,* &c.; the ordinary name of each pleading being postponed one step. The avowry and cognizance are, in fact, of the nature of a declaration.

The ninety-second and ninety-third sections of the Simplifying Act enable a party to plead any defence which may arise after the commencement of the action, or after the last pleading, without any other form than that which the nature of such pleadings must necessarily have, in the language which expresses them the most exactly. These two sections, together with the two immediately preceding, make the form of all pleas as simple as the most exact demands of a common sense system of law procedure can require. The sections under special consideration are in these words:

92. "Any defence arising after the commencement of any action shall be pleaded according to the fact, without any formal commencement or conclusion; and any plea, which does not state whether the defence set up arose before or after action, shall be deemed to be a plea of matter arising before action.

93. "Any defence which may arise after the last pleading, in any case, may be pleaded with an allegation that the matter has arisen since the last pleading."

By the ninety-fourth, fifth and sixth sections of the Act of Simplification, in all actions, except for causes into which some degree of criminality enters (which are enumerated), the defendant, or one or more of several defendants, shall be

at liberty to pay into Court a sum of money, by way of compensation or amends; and the plaintiff shall either accept or reject the sum so paid in. And in case he shall reject the sum, and the jury shall find that it is sufficient, the defendant shall be entitled to his costs of suit, and the plaintiff only to the sum paid into Court. And a proper form of plea is provided for the case.

These sections are intended to encourage the settlement of cases without trial. The rights of plaintiff and defendant are equally considered. If the plaintiff does not accept the sum paid into Court, he runs the risk of paying the costs of the suit. And as the defendant is precluded from denying the claim of the plaintiff, if he pleads a sum in satisfaction, so far as the matter to which it is pleaded is concerned, he will hardly make such an offer, except in cases where justice requires it. The excepted cases involve an injury to the plaintiff's feelings, and are not properly within the justice of the rule; as in such cases a plaintiff ought to have a free course of redress, to deter men from wrongs to their neighbours. The sections are as follows:

94. "It shall be lawful for the defendant, or for one or more of several defendants, in all Actions (except Actions for Assault and Battery, False Imprisonment, Libel, Slander, Malicious Arrest or Prosecution, Criminal Conversation, or debauching of the Plaintiff's daughter or servant), to pay into Court a sum of money, by way of compensation or amends; and the money shall be paid to the Clerk, subject to the order of the Court, and the Clerk shall give a receipt for it upon the back of the plea, and the said sum shall be paid out to the Plaintiff, or his Attorney, upon a written authority from the Plaintiff on demand.

95. "When money is paid into Court, such payment shall be pleaded as near as may be in the following form:

"'The Defendant, by ———, his Attorney (*or in person*,

&c.,) (if pleaded to part, say, as to $ ——, *parcel of the money claimed*), brings into Court the sum of $ ——, and says that the said sum is enough to satisfy the claim of the Plaintiff, in respect of the matter therein pleaded to.'

96. "The Plaintiff, after the delivery of a plea of Payment of Money into Court, shall be at liberty to reply to the same, by accepting the sum so paid into Court in full satisfaction and discharge of the cause of Action, or of the matter in respect of which it has been paid in, and he shall be at liberty in such case to have his costs taxed, and if they be not immediately paid, he shall have judgment for the costs so taxed; or the Plaintiff may reply that the sum paid into Court is not enough to satisfy the claim of the Plaintiff, in respect of the matter to which the plea is pleaded; and, in the event of an issue thereon being found for the Defendant, the Defendant shall be entitled to his costs of suit, and the Plaintiff to the sum paid into Court."

There are certain causes of action which may be considered to partake of the character both of breaches of contract and of wrongs. It may, therefore, sometimes be doubtful whether the plea should treat the declaration as framed for a breach of contract or for a wrong. The ninety-seventh section of the Simplifying Act applies to such cases the following rule:

97. "Whenever there may arise a doubt whether the cause of action is of the nature of a breach of contract or of a wrong, the Court shall give the Defendant the benefit of the doubt; and any Plea in such case, which shall be good in substance, shall not be objectionable on the ground of its treating the Declaration, either as framed for a breach of contract or for a wrong."

It is a rule of pleading, that an entire plea is not divisible. Therefore, if a plea be pleaded to the whole declaration, and is not an answer to all the counts, though it be to some, the

plea being indivisible, is no answer to the counts to which it would be an answer if pleaded to them only. The plea of set-off, under the old system of pleading, was no exception to this rule, and if pleaded to the whole declaration, and the Defendant proved some amount of set-off, but not exceeding or equalling the Plaintiff's aggregate demands, the Defendant could have no allowance for so much as proved, but the Plaintiff would have verdict for his whole claim. (1st Saund. R. 28, n. 2, and n. *d.*) The Act of Simplification has changed the rule in regard to set-off, and other pleas which are, like it, distributive in their nature, by the following section:

98. "Pleas of payment and set-off, and other pleadings capable of being construed distributively, shall be taken distributively, and if issue is taken thereon, and so much thereof as shall be sufficient answer to part of the causes of action proved, shall be found true by the Jury, a verdict shall pass for the Defendant in respect of so much of the causes of action as shall be answered, and for the Plaintiff in respect of so much of the causes of action as shall not be answered."

The ninety-ninth section of the Act of Simplification prescribes a simple form of pleading, which will amount to a denial, in the words of the allegation denied, of a plea or any subsequent pleading and a joinder of issue thereon. It is in these words:

99. "Either party may plead, in answer to the Plea or Subsequent Pleading of his adversary, that he joins issue thereon, which Joinder of Issue may be as follows, or to the like effect:

"'The Plaintiff joins issue upon the Defendant's 1st, &c., (*specifying what or what part,*) Plea.'

"'The Defendant joins issue upon the Plaintiff's Replication to the 1st, &c., (*specifying what,*) Plea.'

"And such Form of Joinder of Issue shall be deemed a direct denial of the Substance of the Plea, or other Subsequent Pleading, and an issue thereon."

The hundredth section of the Simplifying Act is in these words:

100. "Whenever any particular fact is selected and directly denied, as well as where all the facts are directly denied, by any pleading, the party to plead next, shall merely add a joinder of issue."

By the old system of pleading, where ever an express denial of fact occurred in pleading, issue must, at the same time, be tendered on the fact denied. For, as by the contradiction, it sufficiently appears, what is the issue or matter in dispute between the parties, the pleadings ought to be closed, and the method of deciding the issue be adjusted. Tendering issue, meant an offer to refer the issue or matter in dispute, to some mode of trial; and this was done by annexing to the traverse an appropriate formula, proposing either a trial by the *country* (i. e. by jury) or such other mode as by law belonged to the point. The formula, tendering an issue to be tried by a jury, was called the *conclusion to the country*, and was as follows: "And of this, the said C. D. puts himself upon the country." When the issue was thus tendered, it being well tendered, nothing was left to the opposite party but to accept or join in it, which might be done in these words: "And the said A. B. doth the like." This formula was called the *similiter*.

As by the ninety-first section of the Act of Simplification, no formal conclusion is necessary to any plea or subsequent pleading, the formula of tendering issue, and of joining in it are done away. The hundredth section, therefore, is introduced to compel a party to add a joinder of issue, where, under the old system, one was necessarily tendered and accepted. This joinder may be in the form given above in

the ninety-ninth section of the Act of Simplification. And such joinder of issue closes the pleadings.

The next section, the one hundredth and one, is similar in purpose with the preceding. Whenever the defendant cannot take any other issue, without a departure, than the one formed by his plea, the Plaintiff may cut the pleadings short at once, by adding a joinder of issue for the defendant. The section is as follows:

101. "Whenever a Defendant cannot take any new or other issue in his rejoinder, than the matter he has pleaded, without a departure from his plea, or when the issue on the rejoinder would be the same in substance, as on the plea, the Plaintiff shall, in his Replication, plead that he joins issue on the Defendant's plea, and may add a joinder of issue for the Defendant."

The next two sections of the Act of Simplification relate to traverses of immaterial matter. The first of the sections applies where the traverse is exclusively of immaterial matter. The second applies, where it is only partially of immaterial matter. As the precise and simple mode of statement employed in the simplified pleadings, leaves out a great deal of immaterial matter which was required, for the sake of form, in the old pleadings, the evil of traversing immaterial matter will not occur so often as heretofore. The sections are as follows:

102. "If a traverse be taken upon an immaterial allegation, that is, on matter which is either irrelevant or insufficient in law, or matter which is only introductory or explanatory, or matter of aggravation, the opposite party may have judgment as for want of a plea.

103. "No more of an allegation shall be traversed than is material. The circumstances, which, though forming a part

of the allegation, are immaterial to the merits of the action, must not be traversed, and, if traversed, the traverse shall upon motion be corrected, the party so traversing paying costs."

The next section which comes under consideration is in these words:

104. "It shall not be necessary for the Defendant to verify the truth of any plea, except dilatory pleas, by affidavit or affirmation; nor being heir, executor, or administrator, to obtain leave of the Court, to put in a plea denying that the alleged deed, in the suit, is not the deed of the ancestor, testator or intestate."

The Act 1785, ch. 80, 3, required a Defendant to verify by affidavit or affirmation the plea of *non est factum;* and an heir, executor or administrator, to obtain leave of the Court, upon just cause shown, to plead such a plea. The Act of Simplification has abolished the general issues, and therefore there is now no general issue, *non est factum;* yet there is a plea in the same form of negation; and to prevent disputes as to the effect of the abolishment of general issues, on the third section of the Act 1785, ch. 80, the 104 section of the Act of Simplification was introduced. The section does not dispense with the requirement of the Statute 4th Ann., ch. 16, that the truth of dilatory pleas be proved by affidavit.

OF NEW ASSIGNMENT.

The generality of statement allowed in the Declaration in some actions, especially the action of trespass, under the old system of Pleading, sometimes did not sufficiently guide the Defendant to the proper cause of complaint. The Defendant, therefore, in his plea, answered a different matter from

the one the Plaintiff sued him for. For example:—The Plaintiff had been assaulted by the Defendant twice, and the first assault was justifiable, having been committed in self-defence; but the second was committed without any legal excuse. The Plaintiff sues the Defendant for the second assault; but as time is not material in such an action, though necessary sometimes, as in this instance, to distinguish one assault from another, the Declaration states the time in so general a way as not to indicate to which of the two assaults the action refers. The Defendant, therefore, supposes, or pretends that he supposes, that the first is the assault for which he is sued, and pleads self-defence. Now, as the generality of the Declaration had led the Defendant into a mistake, if the Plaintiff should traverse the Defendant's plea of self-defence, the Defendant would have the right, under the issue joined upon such traverse, to presume that it was the assault committed in self-defence which he was sued for, and consequently to prove the self-defence. As then, the Plaintiff could not traverse the Defendant's plea with safety, and having no ground for demurrer, or for pleading in confession and avoidance, he is compelled to correct the mistake occasioned by the generality of his declaration, by a new pleading, and declare that he sued not for the *first* but the *second* assault. This pleading is called a *new assignment.* The matter new assigned must be consistent with the declaration, and not varying from or more extensive than the trespasses therein enumerated, or those which the Defendant has in his plea professed to answer; for a new assignment is merely to avoid the effect of the plea which can only operate upon the trespasses thereby admitted. The new assignment always occurs in answer to a plea, and is, therefore, in the nature of a replication repeating the declaration, and distinguishing the true ground of complaint from that covered by the plea.

The Act of Simplification has three sections on the subject of new assignment. They are as follows:

105. "Where the Defendant pleads an evasive plea, either as to the whole or a part of the cause of action set forth in the Declaration, the Plaintiff may avoid the effect of such plea, by restating his cause of action with more particularity, consistently however with the more general statement set forth in the Declaration.

106. "One new assignment only shall be pleaded to any number of pleas to the same cause of action; and such new assignment shall be consistent with and confined by the particulars, if any, delivered in the action, and shall state that the Plaintiff proceeds for causes of action different from all those which the pleas profess to justify, or for an excess over and above what the defences set up in such pleas justify or both.

107. "No plea, which has already been pleaded to the Declaration, shall be pleaded to such new assignment except a plea in direct denial, unless by leave of the Court; and such leave shall only be granted, upon satisfactory proof that the repetition of such plea is essential to a trial of the merits."

These sections modify the old law of new assignment, in a way which it is not necessary to mention. But it is hoped that the simplified pleadings will obviate the necessity, in practice for new assignments.

RULES WHICH MAKE THE ISSUE A CERTAIN ONE.

We have already considered the general rules for framing the machinery of pleadings. We will now consider other rules that are auxiliary, in making the issue certain. The rules, which we have considered, do, of course, contribute to certainty in the issue: but still these auxiliary rules are

necessary to point more specifically, to some matters of which pleadings are composed, that could not be well stated in the more general rules which we have considered. When it is said, that the issue must be *certain*, the meaning is, that it must be *particular* or *specific* as opposed to undue generality. Now, all the rules for framing the machinery of pleading, tend to develope the question in controversy, by means of that machinery, in a *specific shape*. But as these general rules cannot point out the *degree* of specification with which the question should be developed, it becomes necessary, to lay down special rules in regard to certain facts that must be particularised in different cases, in order to produce a certain issue. These rules we will now proceed to consider.

OF NAMES OF PERSONS.

The rules, of this auxiliary kind, of which I shall first treat, relate to the names of persons, whether parties to an action or only mentioned in a pleading. It is, of course, indispensable to all just legal procedure that the parties meant to be affected by it, should be designated so as to be identified as the proper persons. At the same time, it is expedient, that the mere misnomer of a person, whether party to the action or not, should not be entirely fatal to an action: provided the person intended to be reached by the process is actually reached, and it can be made so to appear to the Court. And it is further expedient, that all errors of misnomer be corrected in the speediest and least expensive mode consistent with justice. The Act of Simplification has devised three rules to carrying into effect these views. They are contained in the following sections:

108. "The Declaration as well as the Summons shall set forth accurately the Christian names and surnames of both parties, and the Christian names and surnames of persons

not parties to the action: but where the name of a person, not a party to the action, shall not be known, an allegation of the fact shall be sufficient."

109. "Whenever a party shall be sued by a wrong Christian name or surname, or both, upon affidavit or other proof to the satisfaction of the Court, at any time before trial, that the writ or process has been served upon the person intended to be sued, the Court shall, upon motion, direct any writ, declaration or other pleading, or any entry, to be amended, by inserting therein, the true name of the party, on such terms as the Court shall deem fit.

110. "A mistake in the name of either party to the action, or of a person not a party to the action, may be objected to as a variance, at the trial."

It is seen that, by the hundreth and tenth section, a mistake in the name of either party to the action or of a person not a party, may be objected to, at the trial, as a *variance.* The doctrine of *variance* is this. The proof offered, may in some cases *wholly* fail to support the affirmative of the issue; but in others, it may fail by a *disagreement in some particular point or points only* between the allegation and the evidence. Such disagreement is called a *variance;* and when upon a material point is as fatal to the party, on whom the proof lies, as a total failure of evidence; the jury being bound, upon *variance*, to find the issue against him. Thus the doctrine of variance, under the old system of pleading, applied to the mistake of the name, of a person *not* a party to the suit, but not, of a *party to the suit.* A mistake in the name of a party to the suit, could only be objected to by a plea in abatement. The Simplifying Act has made the mistake in both cases a variance, at the trial.

When a Plaintiff discovers, at the trial, a variance, he usually takes the course of avoiding a verdict, by voluntarily submitting to a judgment of *non-suit;* and for that pur-

pose, he is supposed to absent himself from the Court. Such judgment does not prevent him from bringing another action; but a verdict would bar him forever.

Misnomer, however, will, under the rules of the two previous sections, be almost always corrected before trial; and a judgment of *non-suit* avoided.

OF TIME.

As every transaction must occur, and every object exist, in time, it was very natural that the time should be stated in pleadings. But as time, in most matters of litigation, does not pertain to the merits of the controversy, it soon became a rule, that, generally, one time might be stated and another proved; if the time be laid under a *videlicit*, which was a technical indication that the true time was not intended to be stated. The Act of Simplification, as we have seen in the fifty-third section, declares that time shall not be stated when it is immaterial. It therefore, left time, when it is material, as under the old law; and has embodied the rule in the hundreth and eleventh section in these words:

111. "When Time forms a material point in the merits of a cause, the day, month and year, or when there is a continuous act, the period of its duration, must be alleged, and proved as laid. When Time is not material, it need not be mentioned, and if mentioned, need not be proved."

OF PLACE.

Every matter of litigation must occur or exist in Place as well as Time; and therefore Place, like Time, would be naturally stated in pleadings. Originally, every fact was laid in the Place where it was really done; and therefore the written contracts bore date at a certain Place. The ori-

ginal object of thus designating the Place, or *laying a venue* as it was called, was to determine the Place from which the jury should be summoned to try the issue in fact; as the jury in the earliest times consisted of persons who were cognizant, of their own knowledge, of the fact in dispute, and were witnesses giving testimony, and not, as now, triers of fact on the testimony of others. Soon a distinction was taken, that in *transitory*, matters, where Place formed no material part of the issue, one Place might be alleged, and another proved, just as in the case of Time. The Simplifying Act therefore, taking advantage of all the mutations in the doctrine of Venue which a long practice of Courts has wrought, has dispensed with the statement of Place when not a material part of the issue, and made it necessary to allege it only when it forms a part of the substance of the issue. The Rule regulating the matter is contained in the hundreth and twelfth section in these words:

112. "It shall be necessary to allege a Place only when it is descriptive of the subject matter of the action, and forms a part of the substance of the issue; and it must be proved as laid."

OF QUALITY OR KIND.

We have heretofore with a view to their Pleadings considered causes of action founded on breaches of contract. We will now consider causes of action founded on injuries to property, with a view of showing how the property must be described in pleading.

When property is involved, in any degree in litigation, it is, of course, necessary to designate it. The most comprehensive legal designations are *real* or *personal*. But this is not sufficient to identify it. It must be so described as to distinguish it from all other real or personal property.

As regards personal property, this is done by specifying

its kind. The Act of Simplification therefore uses the word *kind*, as more appropriate than the word *quality* used by the old law; the word *quality* being commonly used to signify *degree of excellence*, and not *specific difference*, as it is required to signify in this instance. As the distinctions of *kind* are matter of common and not legal designation, the exigencies of pleading need no other rule on the subject, than that personal property shall be described by its kind, as *wheat*, *rye*, *household furniture*, &c.

But real property requires to be described in a different mode. Its place or location is its fundamental element of designation. It can be accurately designated only by artificial or imaginary lines separating it from all other real property. But, as in actions for injuries to real property, it is oftener the mere fact of the injury, or the title, than the lines which comes into dispute, it is expedient that the plaintiff should not be confined to a description by courses and distances, but be permitted to use other easier modes of description when he pleases to do so. Accordingly the law has always allowed it. And the Plaintiff might under the old law, in his declaration, describe the property by the general name of *his close*. This indefiniteness of description, upon the plea of *liberum tenementum* being pleaded by the Defendant, compelled the Plaintiff to new assign, and describe the property more accurately. This circuity, and the consequent delay, ought to be prevented by compelling the Plaintiff to describe the property in the declaration so as to identify it. This, the Act of Simplification does; and the section is so worded as to embrace injuries to chattel as well as to other interests in land or real property; for though, in law, chattel interests in land are considered personal property, yet their nature is real, and therefore, they must come under the rule describing real property. The Act of Simplification regulates the description of personal property by one section, and that of real property by another. These sections are as follows:

113. "In actions for injuries to goods and chattels, their kind or species shall be alleged in the declaration, and proved as laid.

114. "In actions for breaking the Plaintiff's close, or for an injury to real property, the Plaintiff shall describe the property, and when the injury is to an incorporeal herditament, shall describe the property in respect of which the right is claimed, (as well as the right itself,) in his declaration, either by the name by which the property is patented, or by its abuttals, or by its courses and distances, or by any name which it has acquired by reputation, or by some other description certain enough to identify it."

OF QUANTITY AND VALUE.

Under the old system of pleading, when the declaration alleged any injury to goods and chattels, or any contract relating to them, their *quantity* and *value* must be stated. And the quantity and value must be specified by the ordinary measures of extent, weight or capacity; as *three bushels of wheat,* of *the value of three dollars.*

But these requirements were not always insisted upon even as law; for two *packs* of flax, and a *library* of books have been held to be sufficient specification of quantity in declarations in trover; and on an action for breaking the the Plaintiff's close with beasts and eating his peas, a declaration not showing the quantity of peas, has been held good; "because nobody can measure the peas beasts can eat." And in actions of debt and *indebitatus assumpsit* for goods sold, the quality, quantity or value of the goods sold was never specified. Therefore, even under the old system of pleading, it was only where quantity and value formed a part of the substance of the issue that, strictly, it was necessary to state them in pleading. The Act of Simplification therefore, in the fifty-third section, requires that quantity and

value when immaterial shall not be stated. But where they form a part of the substance of the issue, they are required to be stated, by the hundreth and fifteenth section as follows:

115. "Where quantity forms a part of the substance of the issue, it must be alleged, and specified with reference to the ordinary measures of extent, weight or capacity. And where value forms a part of the substance of the issue, it must be alleged and specified by the current coin of the United States."

116. "And a verdict shall not be for a larger quantity or value than is alleged."

OF TITLE.

Under the head of Quality or Kind, I showed how, in actions for injuries to property both personal and real, the property must be described in order to make its identity certain. I will now show to *what extent*, and *how* the title to the property must be alleged.

There are many different degrees of right or interest in property, personal or real, from mere possession to absolute ownership. Each of these degrees of interest can be injured. Where an action is brought for an injury to property, it is not necessary to disclose any fuller title than will sustain the right which has been injured. If the Plaintiff has a mere possession, he can sustain an action against a wrongdoer; and therefore in such action a Plaintiff need only allege title of possession, even where he has a fee-simple.

When a title of possession is alleged with respect to goods and chattels, the statement will be supported by proof of any kind of presentinterest in the m, whether that interest be temporary and special, as that of a carrier or finder, or absolute, as that of an owner. So where a title of possession is alleged in respect of corporeal or incorporeal heredita-

ments, it will be sufficiently maintained by proving any kind of estate in possession, whether fee-simple, for life, for term of years or otherwise. It is therefore expedient in cases of injury to property to allege only title of possession; unless the injury be of an interest in remainder or reversion, then, of course, it must be laid accordingly. And in respect of goods and chattels the title can be laid in possession even where there never has been *actual* possession; as the property of the goods and chattels draws to it the possession in law.

The form of alleging title of possession in respect of goods and chattels is, either to allege that they were "the goods and chattels of the Plaintiff," or, that he "was lawfully possessed of them as his own property." These forms of allegation are equivalent; and any one having a right to the possession of goods and chattels may allege them, to be his property, against a wrongdoer. And in an action of Replevin for the specific recovery of the goods and chattels, the allegation of mere title of possession is sufficient, and has always been the mode of allegation in that action.

The form of alleging title of possession in respect of real property, where the action is for breaking the Plaintiff's close is, "certain land of the Plaintiff," &c.; or where the action is for obstructing his right of way, "was possessed of land, &c., and was entitled to a way from said land," &c. These forms of allegation have been prescribed in the Forms given in the Simplifying Act, as we shall see.

Having considered the case where a party alleges title in himself, I will now consider the case where he alleges title in his adversary. It is a general rule, that it is not necessary to state the title of an adversary with as much precision, as one's own title. It must, however, be stated sufficiently to show liability in the adversary.

In showing the liability of the party charged, it is in most cases sufficient to allege title of possession; which may be done in the same forms as when alleging the same title in the party pleading. And if the interest of the party charged

be in the remainder or reversion, the title must be laid accordingly. In an action for rent against an assignee of a term of years, it would be necessary to allege that he was in possession *as assignee.*

There was an exception under the old system of pleading, to the doctrine that it is sufficient to allege mere title of possession against a wrongdoer. In replevin for cattle taken damage feasant, if the Defendant pleaded that he is possessed of a messuage and entitled to common of pasture as appurtenant thereto, and that he took the cattle damage feasant, such mere allegation of possession was not sufficient. He was compelled to allege a fuller title to the messuage and common of pasture.

There was no reason of practice for such doctrinal exception. For, if the Defendant had brought an action for the very same damage which he now pleads the cattle were committing, the allegation of mere title of possession would have been sufficient to sustain his action. Though, perhaps, no such case can occur in Maryland, still, out of caution, the Simplifying Act, as we shall presently see, has abolished the exception.

Where a person entitled to a right of way or other incorporeal hereditament over the land of another, in respect of his possession of another piece of land, sues for an injury to such right of way, or other incorporeal hereditament, he is allowed, as I have already stated, to allege mere title of possession of the land, and the consequent right of way. But if he should be sued by the person over whose land the way runs for a trespass, and he should justify under his right of way, he was, under the old system of pleading, compelled in his plea to allege his precise title to the land in respect of which the right of way was claimed; and also the particular ground of his right, as whether he claimed by grant, by prescription, by express reservation, or by some other mode. This rendered the pleading on the part of the Defendant difficult and various.

The conditions of fair trial do not require the right to be stated more precisely in a plea than in a declaration. If the general statement in the declaration gives sufficient description of the right, it will do so in the plea. The title will be involved in a denial of the injury coupled with the general allegation in the declaration. Therefore the same allegations in the plea when denied by the replication, will also involve the title. The Simplifying Act has, therefore, in actions relative to incorporeal hereditaments, made the plea a counterpart of the declaration, in cases like those just mentioned.

The remarks which we have made on the subject of title are in connection with the following sections of the Act of Simplification:

117. "When in pleading, any right or authority is set up in respect of property, personal or real, some title to the property must be alleged in the party, or in some other person from whom he derives his authority. And if a party be charged with any liability in respect of property, personal or real, his title to that property must be alleged, and proved as laid.

118. "In no case shall it be necessary to allege title more particularly than is sufficient to show the right or authority claimed, or the liability charged.

119. "In the action of replevin for cattle taken, damage feasant, it shall be sufficient for the Defendant to allege mere title of possession.

120. "In an action for breaking the Plaintiff's close, when the Defendant justifies under a right of way or other incorporeal right over or in the Plaintiff's close, it shall not be necessary for the Defendant, in his plea, to set forth his full title to another close, in respect of which he claims such right; but he may plead generally, that he was possessed

of his close, and had the right claimed, for the more convenient occupation of the close; as a Plaintiff is allowed to do in his declaration, when suing for an injury to such incorporeal rights."

OF DERIVATION OF TITLE.

Under the old system of pleading, if the title was an absolute one, as a fee simple, it was sufficient to allege a *seisin in fee simple*, without showing the derivation or commencement of the estate. But if the title was less than a fee simple, it was necessary to state its commencement, that is, to show the derivation of the title from the last seisin in fee. The Act of Simplification modifies these Rules, and enacts:

121. "It shall not be necessary to allege the commencement of either a particular or of a superior estate, unless it be essential to the merits of the cause."

As this section implies, it is sometimes essential to the merits of a cause to show the derivation of the title, both of a fee simple, and a less estate. Thus: If an action be brought by the lessor against the lessee on the covenants of the lease, the Plaintiff need allege no title to the premises demised; because a tenant is estopped from denying his landlord's title. But, on the other hand, a tenant is not bound to admit title to any greater extent than might authorize the lease; and, therefore, if the action be brought not by the lessor himself, but by his heir, executor, or assignee, the title of the lessor must be alleged; in order to show that the reversion is now legally vested in the Plaintiff in the character in which he sues. And if he sues as heir, he must allege that the lessor was seised in fee; for the tenant is not bound to admit that he was seised in fee; and unless he was so, the Plaintiff cannot claim as heir.

But if he sues as executor or assignee of a lessor, who had been entitled for a term of years, though it is necessary, in the declaration to state the title of the lessor, in order to show that the Plaintiff is entitled to maintain the action as his representative or assignee, yet, as the title is, in this case, alleged by way of inducement only (the action being mainly founded on the lease itself,) the particular estate, for years, may be alleged in the lessor, even under the old pleading, without showing its commencement.

The Act of Simplification has two other sections under this head of derivation of title. They are as follows:

122. "Where a party claims by inheritance, either immediate or mediate, he shall allege how he is heir, as son, nephew, or otherwise.

123. "Where a party claims by conveyance, he may state it according to its legal effect or name."

The first of these sections may be illustrated by the case given above, of the party suing as the heir of a lessor. In such case, he must show, whether he inherits as son, or nephew, or as the case may be. The latter section may be illustrated by the following example. In an action for a trespass, if the Defendant pleads that E. F., being seised in fee, demised to G. H., under whose command the Defendant justifies the trespass on the land; and the Plaintiff in his Replication admits E. F.'s seisin, but sets up a subsequent title in himself to the same land, in fee simple, prior to the alleged demise, he must show the derivation of the fee from E. F. to himself, by conveyance antecedent to the lease under which G. H. claims. Now, the Plaintiff, in alleging the conveyance of the fee from E. F. to himself, may simply state that E. F, *conveyed the land to him in fee simple*, antecedent to the lease to G. H. And it is observable, that the Defendant, in alleging the lease to G. H., simply makes use of the word *demised*. In pleading a conveyance for life or

for years, the technical form is to allege it as a *demise* for life or for years. But the description of it as *a conveyance for life* or *for years*, especially since the simplification of Conveyancing in Maryland, is the most consistent, and equally correct form of allegation.

RULES WHICH MAKE THE ISSUE A SINGLE ONE.

We have seen, that under the Act of Simplification any number of causes of action may be sued on in the same action. We have also seen, that the Defendant may plead any number of defences to the declaration or any subsequent pleading of the Plaintiff; and that the Plaintiff may plead in answer to the plea or any subsequent pleading of the Defendant, as many several matters as he may deem necessary. Yet there is a rule, that pleadings must not be double; and the object of the rule is defined to be, *the avoidance of several issues.* Now, it is manifest, that if several causes of action be sued on in the same action, and several pleas be pleaded, that several issues will necessarily be formed. It therefore behooves us, to explain the meaning of the Rule against duplicity or doubleness in pleading.

The rule applies both to the declaration and subsequent pleadings. Its meaning, with respect to the declaration, is that it must not, in support of a single demand, allege several distinct matters, by any one of which the demand is sufficiently supported. As, where the Plaintiff declared in an action, that the Defendant was indebted to him in a certain sum, for nourishing one E. L. at the request of the Defendant, which the Defendant promised to pay; and also, that the Defendant promised to pay so much as he reasonably deserved to have, for nourishing the said E. L. during the same time. This declaration is bad for duplicity; for there are two promises, one to pay a certain sum, and the other

to pay a quantum meruit, either of which will support the demand of the Plaintiff.

With respect to the pleadings subsequent to the declaration, the meaning of the rule is, that none of them must contain several distinct answers to that which preceded it. Duplicity in *a plea* may be thus exemplified. In an action for breaking a close, and depasturing the herbage with cattle, if the Defendant pleads that A. had a right of common, and B. also a right of common in the close, and that the Defendant, as their servant, and by their command entered and turned in the cattle in exercise of their rights of common, the plea is bad for duplicity, because the title of either one or other of the commoners, and the authority derived as his servant, would have alone constituted a sufficient answer to the declaration. Of duplicity in the *replication* the following is an instance: The Plaintiff declared for breaking and entering his stable, cutting asunder a beam, and throwing down the tiles of the roof. The Defendant justified as the servant of H. G., and pleaded that H. G. was seised of a wall, in his demesne of fee, and because the beam was placed in the wall of the said H. G. without his consent, the Defendant, as his servant, in order to remove this nuisance, did enter the stable, and cut the beam as near to the wall as he could, doing as little damage as possible, and thereby the tiles were thrown down. The Plaintiff replied, traversing that the wall was H. G.'s; and then further pleaded, that the Defendant, of his own wrong, did throw down the tiles, for the cutting the beam aforesaid. This Replication is bad for duplicity, because, as the first traverse is a complete answer, the second makes the Replication double.

The rule, in its terms, points to *doubleness* only; as if it prohibited only the use of two allegations and answers: but its meaning extends to the case of more than two; because if two will produce the evil of several issues, three or more will aggravate the evil.

The object of the rule against duplicity, being to enforce a single issue upon a *single subject of claim*, admits several issues where the claims are *distinct*. The *declaration* therefore may, in support of *several demands*, allege as many distinct matters as are respectively applicable to each. So the *plea*, though it must not contain several answers to the whole of the declaration may nevertheless make distinct answers to such facts of it as relate to different matters of claim or complaint. Thus, in the example which I have given of duplicity in a plea, if the case be a little varied, and the Defendant, being charged with putting five beasts on the common, pleads that A. and B. had respectively rights of common there, and that he, as the servant of A. put in two of the beasts in respect of *his* common right, and, as the servant of B. put in three, in respect of *his* common right, there would no longer be duplicity; for he pleads the several titles, not as several answers to the same subject of claim or complaint, but as distinct answers to different matters of complaint arising in respect of different cattle. So in the *replication* and other subsequent pleadings. Thus, if an action be brought for trespasses in closes A. and B. and the Defendant pleads a single matter of defence applying to both closes, the Plaintiff may in his replication, give one answer as to so much of the plea as applies to close A. and another answer as to so much of the plea as applies to close B. But neither of the matters thus alleged in answer to such parts of the declaration, as relate to different claims must be such as would alone be a sufficient answer to the whole declaration. Thus, if an action be brought on two promissory notes, the Defendant may plead as to one, payment, and as to the other, duress, yet if he pleads as to one, a release of *all actions*, and as to the other, duress, it will be double; for the release alone is a sufficient answer to both notes.

If there be *several Defendants*, the rule against duplicity does not compel each of them to make the same answer to the declaration. Each is at liberty to plead such plea as he

may think proper for his own defence; and they may either join in the same plea or sever, at their discretion. But if the Defendants have once united in the plea, they cannot afterwards sever at the rejoinder or other subsequent pleading.

Where in respect either, of several subjects, or of several Defendants, a severance has thus taken place in the pleading, this may of course lead to a corresponding severance in the whole subsequent series; and, finally, to the production of *several issues*. And where there are several issues, they may respectively be decided in favor of different parties; and the judgment will follow the same division.

A pleading subsequent to the declaration will be double that contains several answers, whether they be of the same kind or not. Thus, if it contains several matters in *abatement*, or several matters in *bar;* or *one matter in abatement* and *another in bar*, it will be double. Or by containing several matters in *confession* and *avoidance*, or several matters by way of *traverse;* or by combining a *traverse* with a matter in *confession* and *avoidance*, it will be rendered double. But a matter, will not make a pleading double, that is pleaded only as a necessary inducement to another allegation, though the matter of inducement, if pleaded as an answer; would be of itself a good defence.

The Rule against duplicity being therefore, to enforce a single issue upon a single subject of claim, but admitting several issues upon several distinct subjects of claim, it is necessary to explain the mode of pleading, where several distinct subjects of claim are joined in the same action.

Under the old system of pleading, where several causes of action were joined in the same suit, it was necessary to use what were called, *several counts* in the declaration. These several counts were different sections of the declaration, each containing a formal statement of a separate cause of action, and each constituting a good declaration by itself, so that if the Plaintiff sustained himself upon either count he would

be entitled to judgment upon the cause of action set forth in it, though he failed as to the others.

This use of several counts, when applied to distinct causes of action, is entirely consistent with the rule against duplicity, as the object of that rule, as we have seen, is to prevent several issues in respect of one demand only; and not to prevent several issues where there are several demands. But a practice grew up, at a very early period in England, and it was legitimated in Maryland, of allowing several counts, where there were really not distinct claims; but the several counts were only so many different modes of stating the same cause of action. This took place, when the pleader, in drawing his declaration, having set forth his case in one view, is doubtful whether, as so stated, it may not be insufficient in law, or incapable of proof in point of fact; and at the same time perceives another mode of statement, by which his difficulty may perhaps be avoided. He therefore, inserts the second form of statement in the shape of a second count, in the same manner as if he were proceeding for a separate cause of action; and if he saw a still further mode of allegation that might be available, he added other counts; thus giving, in practice, a great variety of counts in respect of the same cause of action. Thus where a person has ordered goods of another, and an action is brought against him for the price, the circumstances may be such as to raise a doubt whether the transaction ought to be described as one of *goods sold and delivered* or of *work and labor done.* In this case two counts, would be used, setting forth the claim both ways; in order to secure a verdict, at all events, upon one of them. Whether, however, the subjects of the several counts were really distinct or identical, they must always *purport* to be founded on distinct causes of action; and this was indicated, by inserting in each count after the first, such words as "other," "the further sum," all indicating a separateness and difference.

The Defendant on his part could demur to the whole declaration, or plead a single plea to the whole; or demur to

one count, and plead to another; or plead a several plea to each count, or several pleas to distinct parts of the same count; and, by the Statute of Anne, several pleas to the whole declaration or to each count; for the Defendant may have several distinct answers to give to the *same* claim or cause of action. And as the Plaintiff, in the case of several counts found it convenient to vary the mode of stating the same subject of claim, so the Defendant, under the form of pleading distinct matters of defence, stated variously, in various pleas, the same defence; either by presenting it in an entirely new view, or by omitting merely, in one plea, some circumstances alleged in another. But the several defences must each be pleaded as a *new* or *further* plea, with a formal commencement and conclusion as such; so that it would be improper to incorporate several matters in *one plea.*

When several pleas are pleaded, either to different matters, or to the same matter, the Plaintiff may, according to the nature of his case, either demur to the whole, or demur to one plea and reply to another, or make a several replication to each plea, or, by the 89th section of the Act of Simplification, make several replications to each plea; and in the three last cases the result may be a corresponding severance in the subsequent pleadings, and the production of several issues. But whether one or more issues be produced if the decision, whether in law or fact, be in the Defendant's favor, he is entitled to judgment in respect of that subject of demand or complaint, to which the successful plea relates; and, if it were pleaded to the whole Declaration, to judgment generally, though the Plaintiff should succeed as to the other pleas.

The Act of Simplification has the two following sections in respect of singleness in pleading:

124. "Any number of facts constituting one cause of action, or one defence, or one reply, or any other pleading, may be combined; but each cause of action, and each de-

fence, and each reply, shall be stated in a separate paragraph, and shall be numbered.

125. "If each cause of action, or each defence, or each reply, or other pleading shall not be stated in a separate paragraph, and numbered, the Court, or the Judge, at any time after such pleading is filed, and before it is pleaded to, may, upon suggestion in writing, filed in the cause, stating such defect in the pleading, and a copy of the suggestion being served upon the party so pleading defectively, or his attorney, order the defective pleading to be corrected at the costs of the party so pleading defectively. But if the opposite party plead to such defective pleading, such formal defect shall thereby be cured."

These sections, it is obvious, no not change, in any material point, the rule against duplicity. The doctrines which I have stated in exposition of that rule, are still applicable under the simplified system of pleading. The only change effected by these sections is in the mode or form of pleading; and in the mode or form of correcting the defect of duplicity. Under the old system, each cause of action must be stated in a separate count, and every defence in a separate plea with a formal commencement and conclusion. Under the simplified pleading, it is only necessary to state in a separate paragraph, and to number each cause of action, and each plea; and this paragraphing and numbering will sufficiently designate them as separate and distinct. And the same cause of action, or the same defence, or the same reply, may be stated in various ways; and if, in separate paragraphs and numbered, will be as separate and distinct, as they would have been under the old system, if stated in separate counts and pleas in due technical form.

The defect of duplicity, or not paragraphing and numbering the causes of action or defences, is, under the last of these sections, to be corrected upon suggestion in the nature

of a motion; whereas, it was corrected upon special demurrer under the old system. But, if the opposite party plead to such defective pleading, the defect is thereby cured, just as it was under the old system.

I have now passed, in review, all the rules for constructing the Simplified Pleadings. All these rules conduce to form pleadings which end in single issues involving the merits of causes of litigation.

OF JUDGMENT.

It is the duty of the Court, upon a point of law being raised by demurrer, to give the proper judgment. So, upon the facts being found by a verdict or shown in any other legal mode, the Court is bound to pronounce the proper judgment. The judgment is entered in such form as is legally appropriate to the particular case. Under the old system of pleading, there was one form for entering the judgment in debt on a sealed instrument, and a different form for a judgment in case on a note not under seal. But as the Act of Simplification, as we have seen, has abolished all forms of action, so that debt and damage may be sued for in the same action, and joined in the same declaration, the Act further authorises that, when a Plaintiff recovers a sum of money, the amount shall be awarded to him without any distinction between debt and damage. The two sections of the Act, on the subject, are as follows:

126. "In all actions where the Plaintiff recovers a sum of money, the amount to which he is entitled may be awarded to him by the judgment generally, without any distinction being therein made as to whether such sum is recovered by way of debt or damages.

127. "The form of all judgments shall be merely a state

ment, in common language, of the award of the Court, without regard to the forms of action heretofore existing."

JUDGMENT NON OBSTANTE VEREDICTO.

Though a judgment against a verdict can hardly ever be required, yet the Act of Simplification has prescribed the condition on which such a judgment can be rendered. The Plaintiff in a case coming within the condition of the section of the Act would move for a judgment, to be given to him, *without regard to the verdict* obtained by the Defendant. The section of the Act is as follows:

128. "Whenever the plea is such as to show to the Court that the Defendant is not entitled to judgment upon the merits, and the issue thereon be found for the Defendant, judgment shall be given for the Plaintiff, *non obstante veredicto.*"

REPLEADER.

Where the unsuccessful party, on examination of the pleadings, conceives that the issue joined was not taken on a point proper to decide the action, the practice, though of rare occurrence, is to move for *a repleader.* Either of the parties may, from misapprehension of law, or oversight, have passed over without demurrer, a statement on the other side immaterial and insufficient in law; and an issue in fact may have been ultimately joined on such immaterial statement, and so the issue will be immaterial, though the parties have made it the point in dispute between them. In such cases, therefore, the Court, not knowing for whom to give judgment, will *award a repleader*, thereby ordering the parties to plead *de novo*, for the purpose of obtaining a better issue. (See 7th Harr. & John. p. 272.) The Act of Simplification has prescribed the following section in regard to repleader:

129. "Whenever the issue, joined and tried, shall be an immaterial one, the Court shall award a repleader; and the parties shall begin to replead at the first fault which produced the immaterial issue. And the pleadings in such case, shall be in the forms hereinbefore prescribed for pleadings in general, and shall be substituted for the defective pleadings."

ABATEMENT.

I have heretofore directed attention to pleas in bar, as they are called, which are substantial and conclusive answers to the action. They either deny, as I have shown, all or some essential part of the averments of the declaration, or, admitting them to be true, allege new facts which obviate or repel their legal effect.

There is a class of pleas called *dilatory* pleas. They are either to the jurisdiction of the Court; or in suspension of the action; or in abatement of the writ. A plea to the jurisdiction of the Court, shows that another Court has jurisdiction of the matter, and charges that the present one has not. A plea in suspension of the action, shows some ground for not proceeding, at present, with the action. A plea in abatement shows some ground for abating or quashing the writ.

These pleas are pleaded before pleas in bar, in the order of practice: but they so seldom occur, that they are postponed to this later consideration. Of pleas to the jurisdiction of the Court, and pleas in suspension of the action, I shall say nothing; they are so rare in practice, as not to fall within the purpose of this treatise.

Pleas in abatement relate either to the person of the Plaintiff or Defendant, showing some personal disability to sue or to be sued; or to the writ, showing, for example, that in an action on a joint contract, all the joint contractors are not named as Defendants, but that one or more is omitted.

Under the old system of pleading, the commencement and conclusion of a plea were always in such form as to indicate whether it was designed as a dilatory plea or a plea in bar. And if matter which goes in *bar* were pleaded, with a commencement and conclusion in abatement, it was a plea in abatement; but if it only *concluded* in abatement, it was a plea in bar. If a plea, containing matter in *abatement*, concluded in *bar*, it was a plea in bar. And if a plea, beginning in *bar*, contained matter in *abatement*, and *concluded* in abatement, it was a plea in *bar*.

There was, too, difficulty in determining when a plea in abatement should only *conclude* with a prayer of judgment, and when it should both commence and conclude with a prayer of judgment; and also when the prayer of judgment should be of the writ only; and when of the writ and the declaration. At least, such is the state of the authorities. The Act of Simplification has endeavored to remedy these and other difficulties in pleas in abatement, by the following sections:

130. "It shall not be necessary to use any prayer of judgment in any plea in abatement. Nor shall it be necessary, in any plea in abatement, to crave oyer of any instrument of writing on which the suit is brought, nor to insert it in the plea.

131. "No formal defence, and no formal conclusion, shall be required in pleas in abatement. They shall commence in the form hereinbefore prescribed for pleas in bar, or to the like effect.

132. "In a plea in abatement for the non-joinder of a co-Defendant or co-Defendants, it shall be necessary to allege, and to prove, that the persons mentioned as not joined are still living, and are residing in the county in which the suit is brought, or the City of Baltimore, if the suit be brought there.

133. "All defects in pleas in abatement shall be corrected, upon motion, as in other pleadings under this code."

It is necessary that a plea in abatement correct the mistake of the Plaintiff, so as to enable him to avoid the same objection in bringing a new suit.

The power of pleading several matters does not extend to dilatory pleas.

MOTIONS.

As demurrer, for mere formal defects in a pleading, has been abolished, the motion has been substituted as a more summary mode of reaching any formal defects which may appear in the simplified pleadings. The motion has been always a mean for drawing the attention of the Court to certain defects in pleadings, which the Court would have rectified in a summary way. "In some cases the Courts will, on motion, order superfluous matter to be struck out of the pleadings, and if there be any vexation, will make the party inserting it pay the costs of the application." (1st Chit. Plead. 211.) To this extent did the Courts act, in rectifying defects in the old pleadings, upon motion. The Simplifying Act has therefore only enlarged the power of the Court, in rectifying pleadings upon motion. I have passed in review all the provisions indicating the motion as the proper mode of calling the attention of the Court to the different defects specified in the provisions. It only therefore remains, to call attention to the provision of the Simplifying Act which prescribes the rule in regard to motions. It is as follows:

134. "Every motion required by this code shall be in writing, and shall assign reasons; but no particular form shall be necessary."

GENERAL PROVISIONAL RULES.

As it is impossible to foreknow all the possible exigencies of administrative justice, rules cannot be prescribed for all cases that may arise in practice. So, in reforming an old system of rules, the reform can hardly be so complete as to embrace every needed change; therefore the Simplifying Act has prescribed two sections: by the first of which, the simplification may be extended by the Courts, upon the analogies of the changes made, to matters that may not have been simplified; and by the second, the laws and usages of the State relating to pleading and practice, that are not in antagonism to the Simplification, and can aid its provisions, are expressly continued in force. The provisions are as follows:

135. "Any matter of pleading, which shall not come within the special provisions of this code, and for which there is not now some rule, which does not conflict with the principles and rules of this code, shall be provided for upon the analogies of the provisions which seem to bear most upon the matter; and of this the Court shall judge, whenever any such pleadings shall have been framed in a cause, and the question is raised by motion. And if the Court shall determine such pleading to be erroneously framed, it shall have it corrected; and in such case the costs of the amendment shall be in the discretion of the Court.

136. "All laws, so far as they are inconsistent with the provisions of this code, are hereby repealed. The laws and usages of this State, relating to pleading, practice and proceedings in civil actions, so far as they are not inconsistent with the provisions of this code, and as far as the same may operate in aid of those provisions, or to supply some omitted case, are hereby continued in force."

By the first of these sections, it will be observed, that the mode by which the analogies of the simplified pleadings shall be made the basis for change in any matter which may happen not to be simplified, is by the pleading being framed for some case in actual practice, and the propriety of the pleading, excepted to, and brought to the consideration of the Court for its adjudication. In many of the attempts at reform, in other countries, the judges have been empowered to make changes, at their discretion, in furtherance of those begun by the legislature. This has proved to be an impracticable mode of reform. The provision of the Act of Simplification seems to be more efficient, and at the same time entirely conservative of the spirit of the simplification which has been effected by the Act itself.

It is by the last of these two sections that I felt authorized to incorporate, in this treatise, the great body of the elementary doctrines, and the rules of pleading, as long practised in this State, with the provisions of the Act of Simplification. These provisions assume the existence of the very doctrines and rules which I have expounded and illustrated. The treatise, therefore, however imperfectly executed, is a consistent whole, and expressly declared legitimate by the hundred and thirty-sixth section of the Simplifying Act, which I have given as the closing section of this chapter of my treatise.

CHAPTER III.

FORMS OF PLEADINGS.

The Rules of Pleading, as I have shown, require the question in controversy to be developed in a specific shape: but the *degree* of specification required, no rule can designate, except in a general way. Hence, established forms, for both the Plaintiff's and Defendant's pleadings, are the best guides to the pleader; as they furnish examples of the requisite degree of specification. If, for example, it be said that, *the declaration must state every thing that is of the essence of the cause of action, and that is of the essence of the cause of action, without which, judgment cannot be given,* (6 Harr. and John. 53,) it gives but obscurely, the substance of the declaration required in a given case, in comparison with the form of the declaration established for the case. So, when it is said, of the pleadings subsequent to the declaration, *each must be an answer to the whole of what is adversely alleged,* we do not apprehend the meaning of the rule as clearly as when we see it embodied in the forms of the various pleadings to which it is applicable. The Act of Simplification, therefore, has prescribed forms of the most usual pleadings constructed according to the rules which I have expounded. And in order to supply the deficiency of the Act in this respect, I have added other forms constructed according to the requirements of the Act, and justified, as we shall see, by the hundredth and thirty-seventh section of the Act, as equally legitimate as those contained in the Act itself, if they conform to the requirements of the Act.

In all actions, which can arise under the simplified procedure, it is necessary to file a *declaration: even a confes-

* There are three classes of cases, in which it is not necessary to file

sion of judgment will not cure the omission. (3 Harr. & McHen. 389; ib. 408; 4 Harr. & McHen. 351.)

Under the old system of pleading, the form of the declaration was determined by the form of the original writ. But under the new system of pleading, only the writs of replevin and of ejectment, determine the form of the declaration. The writ of summons does not at all influence the form of the declaration. This writ applies to all cases except to replevin and ejectment. Therefore, if a summons be issued, a declaration for any cause of action, except those for which replevin and ejectment are the prescribed remedies, may be filed; and when the declaration is filed, if it does not meet the case of the Plaintiff, it may be amended so as to embrace any of the various causes of action for which assumpsit, case, covenant, debt or dower might under the old system of pleading be brought. Under the old system of pleading, as the form of the original writ was the same in assumpsit and case, the declaration could be amended from one of these actions to the other; though the one be for a breach of contract, and the other for a wrong independent of contract. (1 Harr. & John. 297.) But, as under the old system, a count on contract, and one on a wrong, as *assumpsit* and *trover*, could not be joined, the declaration could only be amended from one of these cases to the other, by a substitution of one count for the other. But, as now all causes of action, with the exception of those for which replevin and ejectment are the prescribed remedies, can be joined, and counts for all can be stated together, a declaration can always be amended by merely adding the necessary count or counts. If, for instance, the cause of action alleged be only the non-payment of a promissory note, and it should turn out that the cause of action was the non-payment of a single bill, or a breach

a declaration:—1. Scire Facias; 2. Attachment, 4 Harr. & John. 185; 3. Where a case is referred to arbitrators, and an award made, and judgment on the award, 3 Harr. & McHen. 388. But the procedure of the cases is not embraced in the Act of Simplification: nor consequently in this treatise.

of covenant, or any other on contract or not on contract, the declaration can be changed so as to meet the case, by adding the proper cause of action or count, as the causes of action might have been at first joined in the declaration. Hence is manifest the comprehensiveness, and flexibility and minuteness of application, of the simplified pleading.

If a writ of replevin or of ejectment be issued, the declaration cannot be amended to any other case; because these actions are for the specific recovery of personal and real property, and can never be unintentionally misapplied by a Plaintiff, and therefore should be inflexibly fixed to one cause of action.

Under the simplified pleading there are two classes of declarations or counts—the one *general*, the other *special*. The same classification of counts existed under the old system of pleading. We have seen, that it was a rule of the ancient system of pleading, that pleadings must specify *quality*, *quantity* and *value*, thereby rendering the declaration or count *special*. But this rule never applied to the action of debt for goods sold or for work and labour, &c.; a more general form of declaration having been always allowed in this action. In the latter part of the seventeenth century, there grew into practice counts, called *indebitatus assumpsit*, framed upon the model of the declaration in debt on simple contract, in which the quality, quantity or value of the goods sold is never specified. This form of count was gradually extended to all cases of a mere money demand, founded upon simple contract, either express or implied. These counts became of such frequent use, that they acquired the name of common counts. The Act of Simplification has retained these common or general counts in all their ancient significance; but has simplified the declaration, by prohibiting the statement of *a promise* as was done in the old declaration when in fact there was none; and has substituted a new plea in the place of the general issue, *non assumpsit;* as has been already shown.

The first twelve statements of causes of action contained

in the Act of Simplification, are these general counts in a simplified form. These twelve counts, as will be seen, state the causes of action in the same form of beginning, "for money payable by ——— to ——— for." When a set form of words will express a general idea in respect of many different causes of action, it is expedient to employ it as a common form. It allows the declaration to be put into a more simple and succinct form; especially when several different causes of action or counts are joined in the same declaration. It will be observed, that all the twelve causes of action or counts can be joined in the same declaration, by employing the set form of words in the statement of the first cause of action or count only. In such a form the declaration is more easily scanned and understood, than when a different set of words are employed, to denote the indebtedness or liability, in stating each cause of action.

But as great as the advantage of using this set of words is, in framing and also in understanding the declaration, a still greater advantage is gained, by being thereby enabled to frame a plea in one general form which will answer all the twelve causes of action, and as many more of the same kind as may be joined in the declaration. By this form of the declaration, the first plea in the Act of Simplification, "That he never was indebted as alleged," answers all the twelve causes of action distinctly, by a direct denial; and in entire conformity to the principles and rules relative to the direct traverse heretofore expounded. The direct traverse imports a denial in the words of the allegation traversed; and in order to avoid prolixity, it is sometimes better not to deny in the words of the allegation traversed. The plea under consideration is an instance of the kind; and it can be used, without the least danger of giving it the generality of the general issue in debt on simple contract, *nil debit*. The general issue, *nil debit*, involves a double construction, *that he never owed the debt*, or, *that he has paid it*. Thus, by this general issue, the distinction between a traverse and a confession and avoidance was abrogated. For *nil debit* (does

not owe,) is adapted to any kind of defence that tends to deny an *existing debt*. Therefore, not only a defence denying an original indebtedness, but the defences of release, satisfaction, arbitrament and many others are applicable to such a plea. But the plea under consideration does not admit of a double construction. It throws the defence back to the original indebtedness; and consequently, neither payment, nor any thing in confession and avoidance, can be given in evidence under the issue formed by it. The denial is, in such a form, as not to let in testimony of matters subsequent to the original indebtedness.

But while the plea narrows the issue, and preserves the distinction between a traverse and a confession and avoidance, the statement of the causes of action in these general counts have just the same import they had in the *indebitatus assumpsit* counts. All causes of action remain as they were before the Simplification; and the simplified statements of them have the same legal import. The counts, for *money lent;* for *money paid;* for *money had and received;* and for *money found due on accounts stated*, have just the same scope and are sustained by just the same proofs, as under the old system of pleading. These counts, and the proofs of them, have been so established in judicial construction; and the one, for *money had and received,* imports in law so much more than the words literally express, that it would have produced great confusion if an attempt had been made to change their established significance. These four counts, therefore, with the new plea adapted to them, can be used in every instance where they were applicable, under the old system of pleading, in their form of *indebitatus assumpsit.* And though the new general plea excludes much evidence which could have been adduced by the Defendant, under the plea of *non assumpsit*, and also the evidence which the Plaintiff could adduce to rebut it: yet the evidence in support of the causes of action are not at all changed. Under these counts, for instance, a promissory note may be given in evidence, as between drawer and payee, or endorser

and his immediate endorsee, (7 Harr. & Johns. 32; 4 Harr. & Johns. 535, 336;) and this, even when it is the note of a firm of which the Defendant is a partner. (2 Harr. & Gill, 274.) And under the count for money had and received, the Plaintiff can recover wherever the Defendant, upon the circumstances of the case, ought, by the ties of natural justice and equity, to refund or not to retain the money. (2 Burr. R. 1012; 1 Chit. Plea. 305–8.) So, under the count on an account stated, the Plaintiff can recover wherever a certain and precise sum is admitted to be due, though it should relate to only one item or transaction. (1 Chit. Plea. 308.)

It will be observed that all the statements of causes of action founded on contract, except the first twelve, contained in the Act of Simplification, are special. And it is more in accordance with the spirit of special pleading, and particularly of the simplified system, that the declaration or count should be special. But, then, no system of special pleading would be so fully adequate to the exigencies of judicial procedure, without these general counts to be used as a reserve in a declaration, in case of failure upon the more special ones. They are, however, illegal in some cases. And to use them, to the exclusion of the special counts, would, too, even where they are legitimate, be often found inexpedient. They can, however, of course, be used either alone or together, with special counts in a declaration in the class of cases to which they are appropriate.

The distinction of General and Special Counts does not obtain in actions for wrongs independent of contract; but the declaration for such injuries is always special; as will be seen by the Forms in the Act of Simplification.

I will now give the Forms of Pleadings as they are presented in the Act of Simplification. They are introduced by a section of the law, which enacts that the pleader shall not be bound inflexibly to the letter of the Forms, but that the letter may be departed from if the spirit of simplicity be preserved. The section is as follows:

137. "The Forms of Pleading which follow shall be sufficient; and those and the like Forms may be used, with such modifications as may be necessary to meet the facts of the case; but nothing herein contained shall render it erroneous or irregular to depart from the letter of such Forms, so long as substance is expressed without prolixity.

COMMENCEMENTS OF DECLARATIONS.

Venue. "A. B., by S. T., his attorney, (*or in Person, as the case may be,*) sues C. D., for (*here state the cause of action.*")

CONCLUSIONS OF DECLARATIONS.

"And the Plaintiff claims $— (*or if the action is brought to recover specific goods,*) the Plaintiff claims a return of the said goods or their value, and $—, for their detention."

STATEMENT OF CAUSES OF ACTION ON CONTRACTS.

I. Money payable by the Defendant to the plaintiff for (*these words: "Money payable, &c.," should precede Money counts, like I. to XII. inclusive, but need only be inserted in the first,*) goods bargained and sold by the Plaintiff to the Defendant.

II. Work done and materials provided by the Plaintiff for the Defendant at his request.

III. Money lent by the Plaintiff to the Defendant.

IV. Money paid by the Plaintiff for the Defendant, at his request.

V. Money received by the Defendant for the use of the Plaintiff.

VI. Money found to be due from the Defendant to the Plaintiff on accounts stated between them.

VII. A messuage and lands sold and conveyed by the Plaintiff to the Defendant.

VIII. The good will of a business of the Plaintiff, sold and given up by the Plaintiff to the Defendant.

IX. The Defendant's use by the Plaintiff's permission, of messuages and lands of the Plaintiff.

X. The hire of (*as the case may be,*) by the Plaintiff let to hire to the Defendant.

XI. Freight for the conveyance by the Plaintiff for the Defendant at his request of goods in ships.

XII. The Demurrage of a ship of the Plaintiff kept on Demurrage by the Defendant.

XIII. That the Defendant on the — day of ———, by his Promissory Note, now over-due, promised to pay to the Plaintiff $——, *sixty days* after date, but did not pay the same.

XIV. That one A. on, &c., (*Date,*) by his Promissory Note, now over-due, promised to pay to the Defendant, or order, $——, *sixty days* after date; and the Defendant endorsed the same to the Plaintiff; and the said note was duly presented for payment, and was dishonored, whereof the Defendant had due notice, but did not pay the same.

XV. That the Plaintiff, on, &c., (*Date,*) by his Bill of Exchange, now over-due, directed to the Defendant, required the Defendant to pay the Plaintiff $——, *sixty days* after date; and the Defendant accepted the said Bill, but did not pay the same.

XVI. That the Defendant, on &c., (*date*,) by his bill of exchange directed to A., required A. to pay to the Plaintiff $— *sixty days* after date, and the said bill was duly presented for acceptance, and was dishonored, of which the Defendant had due notice, but did not pay the same.

*That the Defendant, on &c., (*date*,) by his bill of exchange directed to A., required A. to pay to one H. or order $— *sixty days* after date; and the said H. endorsed the same to the Plaintiff; and the said bill was duly presented for acceptance, and was dishonored, of which the Defendant had due notice, but did not pay the same.

That the Defendant, on the —— day of —— by his single bill did promise to pay to the Plaintiff $— *months* after date; but did not pay the same.

That the Defendant on the —— day of —— by his single bill, bound himself to pay to the Plaintiff the sum of $— as follows:—The sum of $— on the —— day of ——; and the further sum of $— on the ——day of ——; but did not pay the same.

XVII. That the Plaintiff and Defendant agreed to marry one another, and a reasonable time for such marriage has elapsed, and the Plaintiff has always been ready and willing to marry the Defendant, yet the Defendant has neglected and refused to marry the Plaintiff.

XVIII. That the Plaintiff and Defendant agreed to marry one another on a day now elapsed, and the Plaintiff was ready and willing to marry the Defendant on that day, yet the Defendant neglected and refused to marry the Plaintiff.

* The forms, that are not numbered, are not contained in the Act of Simplification, but have been added by myself, prepared on the principles on which I constructed those contained in the Act.

XIX. That the Plaintiff and the Defendant agreed by charter-party, that the Plaintiff's ship, called the "Daniel Webster," should with all convenient speed, sail to L., or so near thereto as she could safely get, and that the Defendant should there load her with a full cargo of coffee, or other lawful merchandise, which she should carry to B., and there deliver on payment of freight $— per ton; and, that the Defendant should be allowed ten days for loading, and ten days for discharge, and ten days for demurrage, if required, at $— per day; and, that the Plaintiff did all things necessary on his part to entitle him to have the agreed cargo loaded on board the said ship at L., and that the time for so doing has elapsed, yet the Defendant made default in loading the agreed cargo.

That the Defendant covenanted with the Plaintiff, that he would, at all times, upon request, deliver to the Plaintiff all the fat and tallow of all beasts which he should kill or dress before the —— day of —— in every year for *five* years; and the Defendant was often requested, according to said stipulation, but did not perform his said covenant.

XX. That the Defendant, by warranting a horse to be then sound and quiet to ride, sold the said horse to the Plaintiff, yet the said horse was not then sound and quiet to ride.

That the Defendant, by warranting a horse to belong to him, sold the said horse to the Plaintiff; yet the said horse was not the horse of the Defendant.

That the Defendant was a common carrier of goods and chattels for hire and reward. And the Plaintiff was possessed of a package of books, and delivered the same to the Defendant to be carried and delivered, for a certain reward, from Baltimore City to Frederick. And the Defendant received the same to be carried and delivered as aforesaid.

Yet, the Defendant did not carry and deliver the package, but wholly lost it.

That the Defendant was a common carrier, of goods and chattels for hire and reward. And the Plaintiff was possessed of divers goods and chattels, and delivered the same to the Defendant to be carried and delivered, for a certain reward, from Baltimore City to Philadelphia. And the Defendant received the same to be carried and delivered as aforesaid. And the Defendant did not carry and deliver the said goods and chattels safely, but for want of due and proper care being taken of them, they were wholly spoiled.

XXI. That the Plaintiff let to the Defendant a house, No. 200, Market street, in the City of Baltimore, for four years, to hold from the —— day of ——, A. D. ——, at $— a year, payable quarterly, of which rent —— quarters are due and unpaid.

XXII. That the Plaintiff, by deed, let to the Defendant a house on Patrick street, Frederick, in —— county, seven years from the —— day of ——, A. D. ——, and the Defendant, by this said deed covenanted with the Plaintiff, well and substantially to repair the said house during the said term, (*according to the covenant;*) yet the said house was, during the said term, out of good and substantial repair.

XXIII. That the Plaintiff and Defendant, by their agreement in writing, referred the matters therein mentioned to arbitrators; and the arbitrators have made their award in writing, that *the Defendant pay the Plaintiff* the sum of $—, which the Defendant has failed to do.

(*Where the award is not for the mere payment of money as above, but for the performance of some act by the Defendant, that act must be stated in place of the italic line; and where the Plaintiff also is to perform some act either precedent or concur-*

rent, a general averment, "that he has performed (or is ready to perform) all on his part," after the statement of non-performance by the Defendant, as above, shall be sufficient.

XXIV. That one W. T. owed the Plaintiff the sum of $—, and the Plaintiff was about to sue him to recover the same. And in consideration that the Plaintiff would forbear to sue the said W. T., the Defendant agreed to pay the same to the Plaintiff, and the Plaintiff did forbear to sue the said W. T.; and the Defendant has not paid the said sum of $—.

That the Defendant promised to pay the Plaintiff for all necessaries that the Plaintiff should provide one T. H. with; and the Plaintiff provided T. H. with necessaries; and the Defendant did not pay for the same.

For services rendered as a physician, and medicines provided, by the Plaintiff for the Defendant at his request.

For services rendered as an attorney at law by the Plaintiff for the Defendant, at his request.

(*The two preceding counts may, like the common counts, be preceded by the words, "Money payable, &c." It is not necessary to specify the nature and the manner of the work and labor,* (3 Saund. R. 349, (2)) *as is done in these counts. But the Plaintiff may use the common count instead; and prove the special sort of work. It is however better to declare specially, and have the common count also.*)

XXV. That the Plaintiff purchased of the Defendant *a thousand bushels of wheat*, for the sum of fifteen hundred dollars, to be paid for on delivery thereof; and the Defendant promised to deliver the same on the —— day of —— at the Defendant's ware-house, in the City of Baltimore; and on said day, the Plaintiff demanded said wheat at said ware-house, and tendered to the Defendant said sum of fifteen

hundred dollars in payment of the same; and the Defendant refused to deliver the said wheat to the Plaintiff.

That the Defendants on the —— day of —— by their bond acknowledged themselves to be bound to the State of Maryland, in the sum of $—; which bond is subject to the condition:—That if the Defendant A. B., as sheriff of —— county, (*here recite the condition.*)

That at the Circuit Court for —— county, —— Term, 1854, L. H., for whose use this action is brought, recovered judgment against one M. S., for the sum of —— dollars and —— cents, and —— dollars for costs. And that after making the said bond by the Defendants, and before the bringing this action, the said L. H. for the recovery of the amount of said judgment and costs, prosecuted out of the said Court a writ of *fieri facias* to the said A. B., as sheriff of —— County, by which writ he was commanded, of the goods and chattels, lands and tenements, of the said M. S., in his bailiwick, to make the amount of the said judgment and costs, and to have the same before the said Court here to render the same to the said L. H.; and said writ before the return day thereof, was delivered to the said A. B. as sheriff, to be executed by him. And by virtue of the said writ, the said A. B. levied, of the goods and chattels in his bailiwick, of the said M. S., the full amount of said judgment and costs. And the said A. B. has not paid to the said L. H. the sum of money and costs levied as aforesaid.

That the Defendants on the —— day of ——, by their bond, bound themselves to the State of Maryland in the sum of $—: which bond is subject to the condition: That if the Defendant A. B. shall well and truly perform the office of *Executor* of O. M., &c., (*here insert the condition.*)

And the said O. M. in his life time was indebted to S. K., for whose use this action is brought, for

1. Goods bargained and sold by the said S. K. to O. M. in his life time.

2. Work done and materials provided by the said S. K for O. M. in his life time, at his request.

4. That O. M. in his life time, on the —— day of ——, by his promissory note, *over-due in his life time*, promised to pay to the said S. K. $—, *sixty days* after date, but did not pay the same.

And there came to the hands of the said Executor, after the death of the said O. M., assets of the said O. M., sufficient to pay all his debts.

That the defendants, on the —— day of ——, by their bond, bound themselves to the State of Maryland in the sum of $—; which bond is subject to the condition: That if the Defendant A. B.. shall well and truly perform the office of *Executor* of O., &c., (*here insert the condition.*)

And the said O. M. made his last will, and bequeathed to S. K., for whose use this action is brought, *a legacy of one thousand dollars; and the residue of his personal property, after paying the debts, expenses and legacies.*

And there came to the hands of the said executor, after the death of the testator, assets of the testator, sufficient to pay all his debts, the expenses, and legacies; and leaving a large residue. But the said executor has not paid the said legacy and residue to the said S. K.

That the Defendants on the —— day of ——, by their bond, acknowledged themselves to be bound to the State of Maryland in the sum of $—; which bond is subject to the condition: That if the Defendant A. B., as guardian of O. P. of —— county, shall, &c., (*here insert the condition.*)

That after the making the said bond, the said guardian did receive on account of the said O. P., for whose use this action is brought, as his ward, the sum of $———; and, that before the bringing of this action, the said O. P. arrived at the age of twenty-one years, and requested the said A. B.,

to pay to him the said sum of $——, which the said A. B. has failed to do.

FOR WRONGS INDEPENDENT OF CONTRACT.

XXVI. That the Defendant broke and entered certain land of the Plaintiff, called "The Orchard," in —— county, and depastured the same with cattle.

That the Defendant broke and entered the fishery of the Plaintiff, called ——, situated in —— county, and took fish and converted them to his own use.

That the Defendant seized, and took the Plaintiff's *cattle*, that is to say—(*here specify them.*)

That the Defendant detained the plaintiff's *horse.*

XXVII. That the Defendant assaulted and beat the Plaintiff, gave him into the custody of a constable, and caused him to be imprisoned in the jail of —— county, (*or city.*)

XXVIII. That the Defendant debauched and carnally knew the Plaintiff's wife.

XXIX. That the Defendant converted to his own use, or wrongfully deprived the Plaintiff of the use and possession of the Plaintiff's goods; that is to say, *wheat*, *rye*, *household furniture*, (or, *as the case may be.*)

XXX. That the Plaintiff was possessed of a mill, called "Linganore Mill," in —— county, and by reason thereof, was entitled to the flow of a stream for working the same, and the Defendant, by cutting the bank of said stream, diverted the water thereof away from the said mill.

XXXI. That the Plaintiff was possessed of land, called "Idlewild," in —— county, and was entitled to a way from said land, over the land of the Defendant, to a public highway, for himself and his servants, with horses and wagons to go and return, at all times, at his and their free will, for the more convenient occupation of the said land of the Plaintiff; and the Defendant deprived him of the use of the said way, in as ample a manner as he was entitled.

That the plaintiff was the owner of divers goods and chattels, and had hired them for a certain term then unexpired, to one E. F., and whilst the same were so let and in the possession of the said E. F., and the reversionary interest still in the Plaintiff, the Defendant took said goods and chattels out of the possession of the said E. F. and converted them to his own use.

That the Plaintiff let to one A. B. a house, No. 200 Market street, in the City of Baltimore, for a certain term, and whilst the said house was in the possession of the said tenant, and the reversion thereof then belonging to the Plaintiff, the Defendant carelessly dug beneath the foundation of one of the walls of said house, so that the wall was, thereby, damaged to the injury of the Plaintiff's reversionary interest.

(*Under the head "Title," I have stated the doctrine of pleading to be, that in an action for an injury to a reversionary interest in either real or personal property, title must be laid in the declaration accordingly. The two preceding counts are exemplifications of the doctrine.*)

XXXII. That the defendant falsely and maliciously spoke and published of the Plaintiff the words following: that is to say, "he is a thief;" (*if there be any special damage, here state it with such reasonable particularity as to give notice to the Defendant of the particular injury complained of; for*

instance,) whereby the Plaintiff lost his situation of book-keeper in the Bank of Washington.

XXXIII. That the Defendant falsely and maliciously printed and published of the Plaintiff in a newspaper called "The Examiner," the words following: That is to say, "he foreswore himself," the Defendant meaning thereby that the Plaintiff had been guilty of the crime of perjury.

XXXIV. That the Defendant is a corporation owning a railroad between B. and C.; that the Plaintiff was a passenger on said railroad, and by reason of the insufficiency of an axle of the car in which he was riding, the Plaintiff was hurt: that the Defendant did not use due care in reference to said axle, but the Plaintiff did use due care.

(*This form may be varied so as to adapt it to many cases, by merely changing the allegation as to the cause of the accident.*)

XXXV. That the Defendant is an incorporated city and is bound to keep its streets in repair, that one of its streets, called ——— street, was negligently suffered by the Defendant to be out of repair, whereby the Plaintiff in travelling on said street, and using due care, was hurt.

XXXVI. That the Defendant hired from the Plaintiff a horse, to ride from Frederick to Hagerstown, and thence back to Frederick, in a proper manner; and the Defendant rode said horse so immoderately that he became lame and injured in value.

PLEAS.

It is impossible to state all the causes of action, to which a given plea is a proper defence. The pleader is presumed to know what is his proper defence; therefore, in looking

over the different pleas, he can find the one appropriate to his case. All the special pleas which could be pleaded under the old system, are still available defences. All that is required in regard to them, by the Simplifying Act, is that they be stripped of their artificial formal commencements and conclusions, and all other useless allegations, and be pleaded in their mere legal substance. The only pleas of the old system, which cannot be pleaded, are the general issues.

The simplied pleading introduces several new pleas; but they all could have been used under the old system, if the technicalities had not excluded them. These new pleas do not, of course, introduce any new defences; because, whatever is a good defence in law now, was a good defence under the old system by way of evidence if not of plea. Under the old system, the Plaintiff was required to make his statement in an artificial and sometimes fictitious form, which necessitated denials of an artificial and fictitious character; and the substantial defence was adduced in evidence under the fictitious issues formed by the artificial pleadings. The denials, embodied in these new pleas of the simplified system, could have been no denials of the artificial affirmatives of the old pleadings. The artificial affirmative, in implied promises, for example, can only be denied directly by the artifical negative of the promise; and the substantial defence must then be given in evidence, under the artificial issue. But as the Simplifying Act excludes the statement of the fictitious promise from the declaration, the plea of *did not promise* becomes at once inapplicable, and the new plea, *That he never was indebted as alleged*, becomes an admissible form of denial. As, too, in declaring on bills of exchange, there is no longer the allegation of the implied promise in the declaration, the plea of *non assumpsit* does not apply; and two special pleas have been provided: *That he did not accept the said bill of exchange as alleged;* and *that the said bill of exchange was not duly presented for acceptance as alleged.* These two pleas were facts or defences which could have

been given in evidence under the plea of *non assumpsit.* So the new pleas, *That he did not agree as alleged;* and *that he did not warrant as alleged*, are also let in as proper forms of denial in all cases where the gist of the averment of the Plaintiff's cause of action is expressed by the words *agree* or *warrant.* As now, in the statement of agreements, and of warranties no artificial words supersede or usurp the meaning of the words *agree* or *warrant*, any denial of these words is legitimate. So, again, the new plea, *That he did not let a house as alleged,* becomes applicable to the special case, by abolishing the technicalities by which it was before excluded. These are all the new pleas introduced by the Simplifying Act in regard to actions on contracts. All the other pleas in regard to actions on contracts are but modifications of old pleas.

In regard to actions for wrongs independent of contract, no new plea has been introduced by the Simplifying Act. The general issue *not guilty*, has, it is true, been abolished; and the plea, *That he did not commit the wrong alleged*, has been substituted for it. But this plea is, in scope, the same with the plea of *not guilty.* Both pleas amount to a denial of the wrong alleged, and no more. In an action for breaking the plaintiff's close or for taking his goods, if the plaintiff did not, in fact, enter the close in question or take the goods; or if he *did* break and enter the close, but it was not *in the possession of the plaintiff*, or *not lawfully in his possession, as against the better title of the Defendant;* or if he did take the goods but they did not *belong to the Plaintiff*, the substituted plea is applicable, just as the plea of *not guilty* was. For as the declaration in such cases alleges the trespasses or wrongs to have been committed on the close or goods *of the Plaintiff*, the new plea, as well as the plea of *not guilty* involves a denial, that the defendant broke and entered the close, or took the goods *of the Plaintiff.* The plea therefore is a good plea wherever the defendant means to contend that the Plaintiff had no possession of the close, or no pro-

perty in the goods, sufficient to entitle him to call them his own. If the defence be of ony other kind, this new plea, like the plea of *not guilty* will not apply. So if the action be for an assault and battery, if the Defendant did *not* assault or beat the plaintiff, this new plea is applicable: but if his defence be of any other description, the plea will be inapplicable. The plea, therefore, differs from *not guilty*, merely in form. This general plea is applicable whenever the wrong is denied.

The Act of Simplification prescribes the following Commencements for Pleas:

COMMENCEMENTS FOR PLEAS.

XXXVII. The Defendant, by S. T., his attorney (*or in person*) says (*here state the substance of the plea*).

XXXVIII. And for a second plea the Defendant says, (*Here state the second plea.*)

[*All pleas must commence in the above forms: and they should specify to which count or counts in the declaration they are pleaded; for when a plea does not profess to be an answer to any particular count, it must be considered an answer to the whole declaration;* (5 Harr. & John 432) *and if it should not be an answer to the whole declaration, though a good answer to a count, it will be good for nothing, as being bad in part, it is bad altogether.* Steph. Pleas. 403–5.]

PLEAS IN ACTIONS ON CONTRACT.

XXXIX. That he never was indebted as alleged. (*This plea is applicable to declarations like those numbered I. to XII.*)

XL. That he did not promise as alleged. (*This plea is applicable to declarations like those numbered XIII. and XIV., and to declarations on simple promises of any kind.*)

XLI. That he did not accept the bill of exchange as alleged. (*This plea is applicable to declarations like that numbered XV.*)

XLII. That said bill of exchange was not duly presented for acceptance as alleged. (*This plea is applicable to declarations like that numbered XVI.*)

XLIII. That he did not agree as alleged. (*This plea is applicable to declarations like those numbered XVII to XIX.*)

XLIV. That he did not warrant as alleged. (*This plea is applicable to declarations like that numbered XX.*)

XLV. That he did not let a house as alleged. (*This plea is applicable to declarations like that numbered XXI.*)

XLVI. That the alleged deed is not his deed. (*This plea is applicable wherever the fact of the execution of any sealed instrument is denied.*)

XLVII. That at the time of the making of the alleged deed, the Defendant was *and still is* within twenty-one years of age.

XLVIII. That at the time of the making the alleged deed the Defendant was and still is the wife of one W. T.

XLIX. That the Defendant was unlawfully imprisoned by the plaintiff, *and others in collusion with him*, until by duress of imprisonment he made the alleged deed.

L. That the alleged deed was procured by the fraud of the Plaintiff.

LI. That the Plaintiff threatened the life of the Defendant unless he would make the alleged deed; and that from fear of the threats he made the same.

LII. That after the sealing and delivery of the alleged deed, it was, without the consent of the defendant, altered, and the words (*insert them*) were inserted *and substituted*, therein, *for the words* (*insert them*).

LIII. That the Defendant delivered the alleged deed, to one A. F., as an escrow on condition that (*state the condition*) then the said A. F., should deliver the alleged deed to the Plaintiff as the deed of the Defendant. And the Plaintiff has not performed the condition.

That upon every request made to him, the Defendant did deliver, to the Plaintiff, all the fat and tallow of all the beasts which were killed or dressed by him, before the said day in every year which has elapsed since the date of said covenant.

That the Defendant was not a common carrier as alleged.

That the Defendant did not receive and undertake to carry and deliver any goods and chattels for the Plaintiff, as alleged.

That the Defendant did not lose the said package, but carried and delivered the same safely.

That the said goods and chattels were not spoiled as alleged.

(*The mode of stating other defences by a common carrier, will readily occur to the pleader.*)

That the said house was not, during the said term, out of good and substantial repair.

LIV. That the alleged cause of action did not accrue within —— years (*state the period of limitation applicable to the case*) before this suit.

LV. That before this action he satisfied and discharged the plaintiff's claim by payment.

LVI. That the Plaintiff at the commencement of this suit was, and still is indebted to the Defendant in an account equal to the Plaintiff's claim, for (*insert the cause of set-off as in a Declaration; See Form, ante,*) which amount the Defendant is willing to set-off against the Plaintiff's claim.

LVII. That *after the alleged claims accrued, and before suit,* the Plaintiff, by Deed, released the Defendant therefrom.

LVIII. That at the *Circuit Court, for —— County,* —— Term, 1854, the Plaintiff recovered judgment against the Defendant for the sum of —— dollars and —— cents, and —— dollars costs; and that said judgment was rendered on the same cause of action mentioned in the Plaintiff's Declaration, and is still a subsisting judgment.

LIX. That he was discharged as an insolvent debtor by the Circuit Court for —— County, (*or Court of Common Pleas for the City of Baltimore,*) on the — day of ——, 1854, and the alleged claim accrued before the filing of his Petition.

LX. That he applied by Petition as an insolvent debtor to the Circuit Court for —— County, (*or Court of Common Pleas for the City of Baltimore,*) on the — day of ——, *eighteen hundred and fifty-four,* and the proceedings under the Petition are still pending; and that the alleged claim accrued before the filing of his Petition.

138. "A Defendant may plead, as in the above Form, that he has applied by Petition as an insolvent debtor to the

proper Court, and that the proceedings under his Petition are still pending, and that the alleged claim accrued before the filing of his Petition. And upon proof of the facts so pleaded, judgment shall only be entered subject to the result of the proceedings under the Petition.

PLEAS IN ACTIONS FOR WRONGS INDEPENDENT OF CONTRACT.

LXI. That he did not commit the wrong alleged.

That the said land at the time of said alleged trespass was the close, soil and freehold of the Defendant, wherefore he entered said land.

That he had a right of pasture on said land for said cattle being his own cattle.

LXII. That he did what is complained of by the Plaintiff's leave.

LXIII. That the Plaintiff was not entitled to the said way over the Defendant's land as the Plaintiff has alleged.

LXIV. That the Plaintiff first assaulted him; and he committed the alleged assault in his own defence.

That the Plaintiff wrongfully entered the defendant's house, and was making a disturbance there, and the Defendant gently removed him.

That he arrested the Plaintiff on suspicion of felony, and did only what was necessary for that purpose.

That the cattle were trespassing on the Defendant's land, and he took and detained them for the injury committed.

LXV. That the Defendant, at the time of the alleged trespass, was possessed of land called "Idlewild," in —— County, and was entitled to a way from said land over the land of the Plaintiff, to a public highway, for himself and his servants with horses and wagons, to go and return at all times, at his and their free will, for the more convenient occupation of the said land of the Defendant; and that the alleged trespass was a use by the Defendant of said way.

REPLICATIONS.

LXVI. The Plaintiff joins issue upon the Defendant's first, second, &c., pleas.

LXVII. The Plaintiff as to the second plea, says, (*state the Answer to the Plea as in the following Forms.*)

LXVIII. That the alleged release is not the Plaintiff's Deed.

LXIX. That the alleged release was procured by the fraud of the Defendant.

That the cause of action did accrue within —— years before this suit.

That at the time the cause of action accrued, the Defendant was out of the State, and the suit was commenced within —— years after his return.

LXX. That the alleged set-off did not accrue within —— years (*state the period of limitation applicable to the case,*) before this suit.

LXXI. That the Plaintiff's claim is upon an account concerning trade between himself and the Defendant, as merchant and merchant.

LXXII. That the Plaintiff was possessed of lands called

"Midsummer," in —— County, whereon the Defendant was trespassing and doing damage, whereupon the Plaintiff requested the Defendant to leave said land, which the Defendant refused to do; and thereupon the Plaintiff gently laid his hands on the Defendant in order to remove him, doing no more than was necessary for that purpose which is the alleged first assault by the Plaintiff.

LXXIII. That the Defendant was not entitled to the said way over the Plaintiff's land as the Defendant has alleged.

LXXIV. That the alleged trespass was not a use by the Defendant of the said way.

LXXV. That the Defendant was not within the age of twenty-one years as alleged.

That the goods for which the action is brought, were necessaries suitable to the Defendant's condition in life.

LXXVI. That the alleged deed was not delivered as an escrow as alleged.

LXXVII. That the Defendant was not, and is not now, the wife of one W. T. as alleged.

LXXVIII. That the Defendant did not make the alleged deed by duress as alleged.

LXXIX. That the alleged deed was not procured by the fraud of the Plaintiff.

LXXX. That the Defendant did not commit the alleged assault in his own defence.

NEW ASSIGNMENT.

LXXXI. The Plaintiff, as to the —— and —— Pleas, says, that he sues not for the Trespasses therein admitted, but for Trespasses committed by the Defendant in excess

of the alleged rights, and also in other parts of the said land and on other occasions, and for other purposes than those referred to in the said Pleas.

(*If the Plaintiff replies and new assigns, the new Assignment may be as follows:*)

LXXXII. And the Plaintiff, as to the —— and —— Pleas, further says, that he sues not only for the Trespasses in these Pleas admitted, but also for, &c.

(*If the Plaintiff replies and new assigns to some of the Pleas, and new assigns only to the other, the Form may be as follows:*)

LXXXIII. And the Plaintiff, as to the —— and —— Pleas, further says, that he sues not for the Trespasses in the —— Pleas (*the Pleas not replied to,*) admitted, but for the Trespasses in the —— Pleas (*the Pleas replied to,*) admitted, and also for, &c.

*PLEAS IN ABATEMENT.

LXXXIV. That the Plaintiff at the time of issuing the Summons in this case, was and still is the wife of one R. B.

LXXXV. That the Plaintiff is within twenty-one years of age; and has declared by attorney, when he should have declared by next friend or guardian.

LXXXVI. That the said contract, in the Declaration mentioned, was made by the Defendant jointly with one W. P., who is still living and is residing in the County (*or the City,*) aforesaid; and was not made by the Defendant alone; and therefore, the said W. P. should have been sued also.

* No dilatory Plea can be received after the rule day, unless the fact upon which it is founded, occurred subsequent to the rule day. 5 Harr. & John. 489.

(*This Form shall be sufficient whether the contract be by parol or by deed.*)

FORM OF AFFIDAVIT TO PLEAS IN ABATEMENT REQUIRED BY THE STATUTE 16 ANNE.

LXXXVII. ——— County,

M. R., (*the Defendant in the cause,*) makes oath and says, that the Plea, hereunto annexed, is true in substance and in fact. M. R.

Sworn before ———

FORM OF DECLARATION, WHEN THE SUMMONS IS RETURNED AS TO SOME OF THE DEFENDANTS, "CANNOT BE FOUND."

LXXXVIII. (*Venue,*) R. G., by S. T., his Attorney, (*or in person,*) sues J. T. and M. B., (but M. B. cannot be found by the Sheriff,) for (*here state the cause of action,*) and the Plaintiff claims from J. T. (*the person summoned,*) $ ———.

COMMENCEMENTS OF DECLARATIONS, BY PERSONS SUING IN SPECIAL CHARACTERS.

LXXXIX. (*Venue.*) A. B., Executor of the last will (*or administrator of the goods, &c.*) of O. H. deceased, by S. T. his attorney, (*or in person,*) sues D. E. for (*here state the cause of action.*)

XC. (*Venue.*) C. K., Trustee of O. X., an insolvent debtor, by S. T., his attorney, (*or in person,*) sues L. P., for (*here state the cause of action.*)

XCI. (*Venue.*) J. T., who is within age, by S. T. his next friend (*or guardian,*) sues W. B. for (*here state the cause of action.*

XCII. (*Venue.*) G. H., who was the husband of L. K. de-

ceased, formerly L. B., who has survived his said wife, by S. T., his attorney, (*or in person,*) sues C. P. for (*here state the cause of action.*)

XCIII. (*Venue.*) B. H. and F. W., surviving partners of T. K. and I. M., (*trading under the name of B. H., F. W. & Co.,*) by S. T., their attorney, (*or in person,*) sue T. H., surviving partner of M. S., (*trading under the name of T. H. and M. S.,*) for (*here state the cause of action.*)

(*The words "trading under the name of, &c., may be omitted, unless the name of the firm be contained in the contract sued on.*)

(*The conclusion of Declarations, by persons suing in special characters, shall be the same with that of declarations, by persons suing in their proper characters.*)

COMMENCEMENTS OF DECLARATIONS BY EXECUTORS AND ADMINISTRATORS.

XCIV. (*Venue.*) A. B. Executor of the last will (*or administrator of the goods, &c.,*) of O. H. deceassd, by S. T. his attorney, (*or in person,*) sues D. E. for, (*here state the cause of action.*)

CONCLUSIONS OF DECLARATIONS BY EXECUTORS AND ADMINISTRATORS.

XCV. And the Plaintiff claims $——, (*or if the action is brought to recover specific goods,*) the Plaintiff claims a return of the goods or their value, and $—— for their detention.

STATEMENT OF CAUSES OF ACTION ON CONTRACT BY EXECUTORS AND ADMINISTRATORS.

XCVI. Money payable by the Defendant to the Plaintiff

for (*these words, "money payable," &c., should precede money counts like* XCVI. *to* CVII, *inclusive, but need only be inserted in the first,*) goods bargained and sold by O. H. in his life time to the Defendant.

XCVII. Work done and materials provided by O. H. in his life time for the Defendant at his request.

XCVIII. Money lent to O. H. in his life time to the Defendant.

XCIX. Money paid by O. H. in his life time for the Defendant at his request.

C. Money received by the Defendant for the use of O. H. in his life time.

CI. Money found to be due from the Defendant to O. H. in his life time, on accounts stated between them.

CII. A messuage and lands sold and conveyed by O. H. in his life time to the Defendant.

CIII. The good will of a business of O. H., sold and given up by O. H. in his life time to the Defendant.

CIV. The Defendant's use, by the permission of O. H. in his life time, of messuages and lands of O. H.

CV. The hire of (*as the case may be,*) from O. H. in his life time, let to hire to the Defendant.

CVI. Freight for the conveyance by O. H. in his life time for the Defendant at his request of goods in ships.

CVII. The demurrage of a ship of O. H. in his life time kept on demurrage by the Defendant.

CVIII. That the Defendant, on the ——— day of ——— by his promissory note, now over-due, promised to pay to O. H. in his life time, $——, *sixty days* after date, but has not yet paid the same.

CIX. That one A. on, &c., (*date,*) by his promissory note, now over-due, promised to pay to the Defendant, or order, $——, *sixty days* after date; and the Defendant endorsed the same to O. H. in his life time; and the said note was duly presented for payment and was dishonored, whereof the Defendant had notice, but has not yet paid the same.

CX. That O. H. in his life time on, &c., (*date,*) by his bill of exchange now over due, directed to the Defendant, required the Defendant to pay to O. H. $——, *sixty days* after date; and the Defendant accepted the said bill, but has not yet paid the same.

CXI. That the Defendant, on, &c., (*date,*) by his bill of exchange directed to A., required A. to pay to O. H. in his life time $——, *sixty days* after date; and the said bill was duly presented for acceptance and was dishonored, of which the Defendant had due notice, but has not yet paid the same.

CXII. That O. H., in his life time, let to the Defendant a house, No. 200 Market street, in the City of Baltimore, for four years to hold from —— day of —— A. D., —— at $—— a year, payable quarterly, of which rent —— quarters were due, at the time of the death of O. H. and were still due and unpaid.

(*As the foregoing declarations are for suits against persons in their proper character, the pleas, already given, can be pleaded to them.*)

COMMENCEMENT OF DECLARATIONS AGAINST EXECUTORS AND ADMINISTRATORS.

CXIII. (*Venue.*) A. B., by his Attorney, (*or in Person, as the case may be,*) sues C. D. Executor of the last will (*or Administrator of the goods, chattels, &c.*) of P. S. deceased, for (*here state the cause of action.*)

CONCLUSIONS OF DECLARATIONS AGAINST EXECUTORS AND ADMINISTRATORS.

CXIV. And the Plaintiff claims $——— (*or if the action be to recover specific goods,*) the Plaintiff claims a return of the said goods or their value, and $——— for their detention.

STATEMENT OF CAUSES OF ACTION ON CONTRACTS, AGAINST EXECUTORS AND ADMINISTRATORS.

CXV. Money payable by the Defendant, to the Plaintiff for (*these words Money payable, &c., should precede Money counts like* CXV *to* CXXVI *inclusive, but need only be inserted in the first,*) goods bargained and sold by the Plaintiff to P. S., in his life time.

CXVI. Work done and materials provided by the Plaintiff for P. S. in his life time at his request.

CXVII. Money lent by the Plaintiff to P. S. in his life time.

CXVIII. Money paid by the Plaintiff, for P. S., in his life time at his request.

CXIX. Money received by P. S. in his life time for the use of the Plaintiff.

CXX. Money found to be due from P. S. in his life time, to the Plaintiff, on accounts stated between them.

CXXI. A messuage and lands sold and conveyed by the Plaintiff to P. S. in his life time.

CXXII. The good will of a business of the Plaintiff sold and given up by the Plaintiff to P. S. in his life time.

CXXIII. The use by P. S. in his life time of messuages and lands of the Plaintiff, by the Plaintiff's permission.

CXXIV. The hire of (*as the case may be*,) by P. S. in his life time, let to hire by the Plaintiff to him.

CXXV. Freight for the conveyance by the Plaintiff for P. S. in his life time at his request of goods in ships.

CXXVI. The demurrage of a ship of the Plaintiff kept on demurrage by P. S. in his life time.

CXXVII. That P. S. in his life time, on the —— day of ——— by his promissory note, now over-due, promised to pay to the Plaintiff $——, *sixty days* after date, but did not pay the same in his life time; nor has the Defendant paid the same since the death of P. S.

CXXVIII. That one A. K., or, &c. (*date*,) by his promissory note, now over-due, promised to pay to P. S. or order, $——, *sixty days* after date; and the said P. S. in his life time endorsed the same to the Plaintiff; and the said note was duly presented for payment, and was dishonored whereof the said P. S. had due notice, but did not pay the same in his life time, nor has the Defendant paid the same since the death of P. S.

CXXIX. That the Plaintiff, on, &c. (*date*,) by his bill of exchange now over-due, directed to P. S. in his life time, required P. S. to pay to the Plaintiff $——, *sixty days* after date; and P. S. accepted the said bill, but did not pay the same in his life time, nor has the Defendant paid the same since the death of P. S.

CXXX. That P. S., in his life time, on, &c. (*date*) by his bill of Exchange directed to A. K., required A. K. to pay to the Plaintiff $——, *sixty days* after date; and the said bill was duly presented for acceptance, and was dishonored, of which P. S. had due notice, but did not pay the same in his life time, nor has the Defendant paid the same since the death of P. S.

COMMENCEMENT OF PLEAS BY EXECUTORS AND ADMINISTRATORS.

CXXXI. The Defendant, executor of the last will (*or administrator of the goods and chattels*,) of P. S., deceased, by S. T., his Attorney, (*or in person*,) says, (*here state the substance of the plea.*)

CXXXII. And for the second plea the Defendant says, (*here state the second plea.*)

PLEAS IN ACTIONS ON CONTRACT BY EXECUTORS AND ADMINISTRATORS.

CXXXIII. That the said P. S., deceased, was never indebted in his life time as alleged.

CXXXIV. That the said P. S., deceased, did not promise in his life time as alleged.

CXXXV. That the alleged cause of action did not accrue at any time within —— years before this suit.

CXXXVI. That the Defendant has fully administered the goods and chattels, rights and credits of the said P. S. deceased; and had done so before this suit.

CXXXVII. That before this suit, and after the lapse of one year, from the date of his letters testamentary (*or of administration,*) the Defendant paid away, in discharge of just claims, all the assets of the said P. S. deceased, which had come to his hands; and, that more than six months before he so paid, he gave notice to the creditors of P. S. to bring in their claims. And that at the time of such payment, he had no notice or knowledge of the alleged claim; and, that since said payment, no further assets have come to his hands.

CXXXVIII. That before this suit and after the lapse of one year from the date of his letters testamentary, (*or of administration,*) the Defendant paid away in discharge of just claims, a large amount of assets of P. S. deceased; and, that more than six months before said payments he gave notice to the creditors of P. S., to bring in their claims. And at the time of said payments he had no notice or knowledge of the alleged claim. And there are other just debts still due from P. S., of which the Defendant had no notice or knowledge at the time of the said payments; and he has not, and never has had, assets sufficient to pay but a proportion of the alleged claim, regard being had to the debts still due from P. S.

COMMENCEMENTS AND CONCLUSIONS OF DECLARATIONS BY EXECUTORS AND ADMINISTRATORS AGAINST EXECUTORS AND ADMINISTRATORS.

CXXXIX. ——— County, A. B., executor of the last will (*or administrator of the goods and chattels, &c.,*) of W. H.,

deceased, by S. T. his attorney, (*or in person,*) sues T. K., executor of the last will (*or administrator of the goods and chattels, &c.,*) of W. K., deceased, for (*here state cause of action.*)

CXL. And the Plaintiff claims $——, (*or if the action is brought to recover specific goods,*) the Plaintiff claims a return of the said goods or their value, and $——, for their detention.

STATEMENT OF CAUSES OF ACTION ON CONTRACT BY EXECUTORS AND ADMINISTRATORS AGAINST EXECUTORS AND ADMINISTRATORS.

CXLI. Money payable by the Defendant to the Plaintiff for (*these words, money payable, &c., should precede the money counts, but need only be inserted in the first,*) goods bargained and sold by W. H. in his life-time, to W. K. in his life time.

CLXII. Work done and materials provided by W. H., in his life time for W. K., in his life-time.

CXLIII. That W. K. in his life-time, on the —— day of —— by his promissory note now over-due, promised to pay to W. H., in his life-time $——, *sixty days* after date, but did not pay the same; nor has the Defendant paid the same since the death of the said W. K.

CLXIV. That one J. M., on, &c., (*date,*) by his promissory note now over-due, promised to pay to W. K., or order, in his life-time $——, *sixty days* after date; and W. K. in his life-time endorsed the same to W. H. in his life-time; and the said note was duly presented for payment and was dishonored, whereof the said W. K. in his life-time had notice, but did not pay the said note, nor has the said Defendant since the death of the said W. K. paid the same.

INDEX.

THE ARABIC NUMERALS REFER TO THE PAGE OF THE BOOK.

ERRATA.

Page 30, fourteenth line from the bottom, for "served," read *renewed*. Page 69, second line from the bottom, for "were," read *we*. Page 97, ninth line from the bottom, for "comment," read *commencement*. Page 139, fourteenth line from the top, for "no," read *do*.

THE FULLEST, THE LATEST, AND THE BEST

REPORTS

OF THE

COMMON LAW COURTS OF ENGLAND,

Containing the Cases decided in the Queen's Bench, Common Bench, and Nisi Prius Courts, from 1813 to 1857, and in the Court of Exchequer and Exchequer Chamber, from 1824 to 1857, are found in

The REGULAR and AUTHORITATIVE Series of the

ENGLISH COMMON LAW

AND

ENGLISH EXCHEQUER REPORTS,

Which present the following CLAIMS to the support of the profession:

1. They are the ONLY SERIES issued as the AUTHORITATIVE and ACKNOWLEDGED medium by which the decisions of the LAW COURTS of England are made public.

2. They contain LATER REPORTS than the Boston series, are MORE FULLY and MORE ABLY reported, and so arranged by preservation of the original paging, that references in reports or by elementary writers, can be traced as readily as in the English editions.

☞ Vol. 2, Ellis & Blackburne's (75 E. C. L. R.) Reports (Q. B.) to January, 1854, was published by us in June, 1854. At that time, the last Queen's Bench case printed in the Boston Law and Equity Reports, was of June 25, 1853. Our volume contained cases decided five months later. The Queen's Bench cases to November 25, 1853, were published in the Boston series in August, 1854, two months after we had distributed the same cases.

Vol. 3, Ellis & Blackburne (77 E. C. L. R.), with cases to the end of Trinity Term, 1854, was published when the latest case of Queen's Bench decisions in the Boston series, was of February 8, 1854, more than four months behind the regular reporters.

Exchequer Reports, vol. 9 (Welsby, Hurlstone & Gordon), distributed by us January 11, 1855, contains cases to May 10, 1854. The last Exchequer case then in the Boston series, was decided February 9, 1854, four months behind the regular Reporter, issued in Philadelphia.

3. They contain MORE CASES decided by the courts represented, than any other series issued in this country.

☞ Vol. 77 ENGLISH COMMON LAW (3 E. & B.), reports EIGHTY-SIX cases decided in the Queen's Bench since January 11, 1854, while but FIFTY-EIGHT Queen's Bench cases, decided since January 1, 1854, are found scattered among Vols. 22, 24, and 25, of the Boston Law and Equity.

Vol. 78 E. C. L. R. (5 J. Scott), reports SIXTY-FIVE cases decided since Nov. 13, 1853, in the COMMON PLEAS, while the L. & E. has but FIFTY-SEVEN cases in that Court since the same period, to vol. 25 inclusive.

Vol. 9 EXCHEQUER REPORTS (WELSBY, HURLSTONE & GORDON), reports ONE HUNDRED AND TEN CASES in the COURTS OF EXCHEQUER, decided since June 24, 1853, while since the same date, the L. & E. reports 107 cases, scattered through vols. 20, 22, 24, and 25.

4. They are almost EXCLUSIVELY CITED in argument of counsel, and referred to by Elementary Writers for Law Authorities. See Smith's Leading Cases, Smith's Contracts, Smith's Landlord and Tenant, by Maude; Byles on Bills and Promissory Notes, Broom's Legal Maxims, Broom's Commentaries on the Laws of England, or almost any recent LAW Book issued in England.

5. The Boston Law and Equity is MADE UP IN THIS COUNTRY from the Law Journal, Jurist, Times, and other Law periodicals, of a weekly, monthly, or quarterly character, and being unknown in England, is NEVER CITED in Court, or REFERRED TO by Law Writers. The periodicals from which it is extracted, are occasionally cited under their own particular names, but they do not possess that permanent value, even in *England*, which is all-important in a series of Reports.

6. The Philadelphia Reports are edited by Judge Sharswood and by Judge Hare, whose labours as editors and as authors have made them so well and so favourably known to the profession.

These series of Reports are by the REGULAR REPORTERS, and form part of the great chain of English authorities at Common Law, extending from the Year Books to the present time. They are the ONLY SERIES issued by AUTHORITY AND UNDER SANCTION OF THE COURT, or cited, with but few exceptions, by *Elementary Writers*. Being printed without condensation or omission, ably edited by Hon. GEO. SHARSWOOD and Hon. J. I. CLARK HARE, and issued in this country *immediately upon their completion* in England, the *regular* and *authoritative* series of the English Common Law and Exchequer Reports presents inducements and advantages greater than those offered by any other series of English or American Reports. In *cheapness, practical value, authority*, and in *punctuality of appearance*, the great elements of value, they are *unsurpassed* by any other English Reports published in the United States. The same difference exists between them and the opposition Reports issued in the English periodicals, as is found between the *regular State Reports* and the issues of the various LAW MAGAZINES in this country.

INDEX TO ENGLISH COMMON LAW REPORTS,

2 VOLS. 8vo. $9.00.

A General Index to all the Points decided in the Courts of Queen's Bench Common Pleas, and at Nisi Prius, from 1813 to the present time, and reprinted in the English Common Law Reports. By GEO. W. BIDDLE and R. C. MCMURTRIE, Esquires.

INDEX TO ENGLISH COMMON LAW REPORTS.

1856. 2 VOLS. $9.00.

This Index is a reliable guide to the immense mass of authorities contained in these Reports. The arrangement is simple and easily understood, and no pains have been spared to insure that accuracy which is indispensable. The editorial labours have been performed laboriously and faithfully. Each case has been carefully read and studied, and every point has been noted, either direct or incidental, upon which the opinion of the court was given. Of the large number of general titles into which the book has been divided, the Editors have made extensive subdivisions, which have been again divided; so that, by means of a suitable reference and running title, the inquirer is directed to the precise page on which he will find the desired authorities. To the page and volume as referred to in the old Index, the names of the cases, the page, and volume of the English Reporter have been added; thus trebling each reference, and rendering almost impossible the existence of any serious error. The titles of *Agency*, *Contract*, *Criminal Law*, *Evidence*, *Executors*, *Landlord and Tenant*, *Partnership*, *Pleading*, *Railway Companies*, *Vendor*, and *Wills* are some of those which have been most amplified, and to which particular attention is invited. The work will be found of the first practical importance to those who have the English Common Law Reports or the original English Reports, as well as to those who have neither, but are in want of a safe and reliable guide to a large body of the best legal authorities.

"The work is very well done, the arrangement being such as is readily understood, and the results of the cases being indicated with brevity and precision."—*Law Reporter*, January, 1857.

"The unmistakeable mark of systematic and intelligent labour meets the eye on every page."—*Legal Intelligencer*, December, 1856.

"We do not hesitate to commend the labours of our friends Messrs. Biddle and McMurtrie to the earnest consideration of the profession, feeling quite sure that the inquirer into the Common Law authorities from 1813, will not be disappointed in readily finding the very case or point he here seeks."—*Law Register*, January, 1857.

We annex a specimen of the Index.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

I. Form and obligation generally.
  (*a*) What is a Bill of Exchange.
  (*b*) What is a Promissory Note.
  (*c*) Place of making.
  (*d*) Place for payment.
  (*e*) Parties to.
  (*f*) Other matters relating to.
II. Alteration of.
III. The stamp.
IV. The acceptance.
V. Presentment for acceptance.
VI. Acceptance supra protest.
VII. Transfer.
VIII. Presentment for payment.
  (*a*) Generally.
  (*b*) Time within which Bills, Notes, and Checks, must be presented.
  (*c*) Place at which presentment must be made.
  (*d*) The hours within which presentment for payment should be made.
  (*e*) Days of grace.
IX. Payment.
  (*a*) Restrictive indorsement.
  (*b*) Notice of application of bill to a particular account.
  (*c*) Payment for honour.
  (*d*) Evidence of payment.
X. Protest.
XI. Notice of dishonour.
  (*a*) Notice by any party accrues to benefit of all.
  (*b*) Who entitled to notice.
  (*c*) Due diligence in giving notice.
  (*d*) Manner of giving notice.
  (*e*) Form of notice.
  (*f*) Proof of notice of dishonour.
  (*g*) Want of notice, how excused.
XII. Bankers.
  (*a*) Liability, where taking lost or stolen note.
  (*b*) Payment of forged bill or check.
  (*c*) Payment of checks and bills.
  (*d*) Liability and duty in other respects.
  (*e*) Lien of bankers.
  (*f*) Interest.
  (*g*) Appropriation of bills or notes.
  (*h*) Other matters.
XIII. Consideration.
  (*a*) Illegal consideration.
  (*b*) Want of consideration generally.
  (*c*) Accommodation paper.
  (*d*) Proof of consideration.

I. Form and obligation generally.

(a) What is a Bill of Exchange.

Instrument drawn payable on a contingency, not a bill. Palmer *v.* Pratt, ix. 538; 2 Bing. 185. Ralli *v.* Sarell, xvi. 422; 1 D. & R. 33.

Instrument treated as a bill, where an obviously supplied omission is made. Phipps *v.* Tanner, xxiv. 669; 5 C. & P. 488.

An order to pay money "provided certain terms are complied with," not available as a bill. Kingston *v.* Long, xxvi. 308; 4 Doug. 9.

The order of time in which the names of the drawer and acceptor of a bill are placed upon it is immaterial. Molloy *v.* Delves, xix. 617; 4 C. & P. 492. S. C. xx. 194; 7 Bing. 428.

Bill may be accepted and indorsed, before drawn. Schultz *v.* Astley, xxix. 655; 2 B. N. C. 544.

But a blank acceptance for a certain sum, altered by the drawer before drawing into a smaller sum, is not a drawing of the bill for the sum expressed in the acceptance. Baker *v.* Jubber, xxxix. 724; 1 M. & G. 212.

Words "value received" not essential to constitute a bill of exchange. White *v.* Ledwick, xxvi. 454; 4 Doug. 247.

A paper containing a request for the payment of money, but not purporting to be made by one having a right to call on the other to pay, is not a bill of exchange. Little *v.* Slackford, xxii. 498; 1 M. & M. 171.

There must be a drawer to a bill. Vyse *v.* Clarke, xxiv. 626; 5 C. & P. 403.

Instrument drawn, payable to drawer or order at a particular place, without being addressed to any person by name, if afterwards accepted by one at the place where made payable, may be declared upon as a bill of exchange. Gray *v.* Milner, iv. 361; 8 Taun. 739.

Bill at sight is not a bill payable on demand, within exception in stat. 22 G. 3, c. 49. Janson *v.* Thomas, xxvi. 276; 3 Doug. 421.

Drawn payable ninety days after sight or when realized is not a bill within custom of merchants. Alexander *v.* Thomas, lxxi. 332; 16 Q. B. 333.

Acceptance in blank for drawer and payee's name not a bill. Stoessiger *v.* Railway, lxxvii. 548; 3 E. & B. 549.

"Fifty-three days after date credit A. or order 500*l.* in cash on account of," signed by managing director of company, is a bill of exchange. Ellison *v.* Collingridge, lxvii.; 9 C. B. 570.

Dividend warrant not negotiable. Partridge *v.* Bank, lviii. 396; 9 Q. B. 396.

Exchequer bills are negotiable passing by delivery. Brandao *v.* Barnett, liv. 518; 3 C. B. 519.

Statement of deposit of leases as security in the body of the note does not affect its negotiability. Fancourt *v.* Thorne, lviii. 310; 9 Q. B. 311.

Instrument in form of note with address in the corner and accepted by that party, may be treated as his acceptance or the note of the drawer. Lloyd *v.* Oliver, lxxxiii.; 18 Q. B. 471.

(b) What is a Promissory Note.

Not necessary that a promissory note should be in itself negotiable. Rex *v.* Box, v. 635; 6 Taun. 325.

It is sufficient that it is a note for the certain payment of a sum of money, whether negotiable or not. Ibid.